SUPREME COURT, U.S.
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No. 96 790

In The

Supreme Court of the United States

October Term, 1996

PROBATION ASSOCIATION OF NEW JERSEY,

Petitioner,

vs.

DEBORAH T. PORITZ, ROBERT L. CLIFFORD, ALAN B. HANDLER, STEWART G. POLLACK, DANIEL J. O'HERN, MARIE L. GARIBALDI, GARY S. STEIN, IN THEIR OFFICIAL CAPACITIES AS JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW JERSEY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. What is the appropriate standard of review in determining whether public employees' First Amendment right of association was violated? Specifically, should the court apply the strict scrutiny test in *Elrod v. Burns*, 427 U.S. 347 (1976) or the balancing test in *Pickering v. Board of Education*, 391 U.S. 563 (1968) to Petitioner's case which involves probation officers' right of affiliation/membership in law enforcement organizations?

2. Does the Court of Appeals' ruling in this matter conflict with this Court's recent decision in *United States v. National Treasury Employees Union*, 513 U.S. ___ (1995)? Specifically, this Court required a higher level of scrutiny than in *Pickering/Connick* balancing test when the matter involves a wholesale blanket ban to a broad category of expression by a massive number of potential speakers and also required the government to show that the recited harms are real, not merely conjectural. The Court of Appeals, under the similar circumstances, applied the less restrictive *Pickering/Connick* balancing test.

3. Can public employees' Due Process rights under the Fourteenth Amendment be protected when the announced policy threatens to terminate their employment if they do not comply with the policy?

4. Did the lower courts in this matter fail to consider extraordinary circumstances in determining whether to exercise supplemental jurisdiction over state law claims even if all federal claims are dismissed?

PARTIES TO THE PROCEEDING

Petitioner is the Probation Association of New Jersey ("PANJ"), the exclusive bargaining representative regarding the terms and conditions of employment of approximately 1,500 probation officers employed by the State of New Jersey. The petitioner was a plaintiff in the United States District Court and an appellant in the United States Court of Appeals for the Third Circuit.

Respondents are the Chief Justice and the Associate Justices of the Supreme Court of the State of New Jersey, in their official capacity.[1] Respondents, through the Administrative Office of the Courts ("AOC"), are the employer of probation officers represented by PANJ. The respondents were all defendants in the District Court proceedings and appellees in the United States Court of Appeals for the Third Circuit.

Seven probation officers including Robert Kirchgessner, Jr. ("Kirchgessner Petitioners") filed a separate action seeking similar relief to that sought by PANJ. The Kirchgessner Petitioners were plaintiffs in the United States District Court and appellants in the United States Court of Appeals for the Third Circuit. The Kirchgessner Petitioners have already filed a Petition for Writ of Certiorari with this Court.

There are no other parties to this action.

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[1] Respondent Robert N. Wilentz, Chief Justice for the New Jersey Supreme Court retired while this matter was pending before the Third Circuit Court of Appeals. Pursuant to Sup. Ct. R. 35.3, Chief Justice Deborah T. Poritz is substituted as a party.

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On July 19, 1996, the United States Court of Appeals for the Third Circuit issued its opinion, affirming the decision of the District Court denying the plaintiff's motion for preliminary injunction and granting the defendants' motion for dismissal.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Third Circuit and its judgment of July 19, 1996. A petition for rehearing was timely filed and was denied on August 21, 1996.

Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. I provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, §1 provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law;

28 U.S.C. §1367(a) provides:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy.

N.J. Const. art. 1 ¶19 provides:

> Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivision or agencies, their grievances and proposals through representatives of their own choosing.

N.J.S.A. §34:13A-5.3 provides:

> [P]ublic employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity.

STATEMENT OF THE CASE

This matter involves the challenge by the Probation Association of New Jersey ("PANJ" or "Petitioner") of the New Jersey Supreme Court's ("Respondent") policy prohibiting probation officers from affiliation with and/or membership in a labor organization of their choice.

Respondent, through the Administrative Office of the Courts ("AOC"), is the employer of probation officers in

the State of New Jersey. In 1993, the Respondent maintained an unenforced policy prohibiting probation officers from joining or being members of law enforcement organizations such as the New Jersey State Policemen's Benevolent Association ("State PBA") or Fraternal Order of Police ("FOP").

In October and November 1993, probation officers overwhelmingly voted to affiliate with the State PBA. (82a) The State PBA agreed to become affiliated with PANJ if such affiliation was not prohibited as a matter of law.

Numerous members of PANJ's organization are former members of the State PBA who continued to pay dues to both PANJ and the State PBA. There are also members of PANJ who are, and have been for many years, members of FOP, an organization not dissimilar to the State PBA. (82a) These members pay dues to both PANJ and the FOP.

In April 1995, PANJ became the exclusive statewide representative of all New Jersey probation officers. As of January 1, 1995, all probation officers became state employees and are therefore exclusively represented by PANJ. Parole officers, who are state employees and who perform the same functions as probation officers, are now presented by the PBA and are in the law enforcement unit of state employees. PANJ seeks to be treated like parole officers.

In response to PANJ's vote to affiliate with the State PBA, Respondent decided to reconsider its policy prohibiting probation officers from affiliation/membership in law enforcement organizations. It appointed a Special Master, Judge Paul R. Huot, to address specific issues

regarding probation officer membership and/or affiliation in law enforcement organizations.

The five specific questions that Judge Huot was appointed to decide, as framed by Respondent, were as follows:

1. What impact, if any, will membership of probation officers in the FOP or the State PBA have on the probation function?

2. Will the affiliation of PANJ with the State PBA result in membership in the PBA of probation officers who are members of PANJ?

3. What is the present number of probation officers who are members of the FOP and what have their activities been in connection with that organization?

4. To what extent, if any, may probation officers become involved in or be seen as supporting political activity as a result of membership in either FOP or State PBA?

5. Does the legislation (N.J.S.A. §34:13A-5.3) prohibiting, subject to certain exceptions, police officers from joining an employee organization that admits non-police to membership imply any legislative policy related to the potential impact on non-police members of such an organization? (55a)

Succinctly stated, Judge Huot was asked to determine what impact membership in or affiliation with a law enforcement organization would have on probation functions.

On March 28, 1994, the Special Master issued his report. (52a) In his report, Judge Huot addressed the primary issue of how membership/affiliation would affect the functions of probation. On the issue of what the functions of probation are, Judge Huot found that there is "little time that can be spent on functions other than strict supervision and the enforcement of the probation order." (64a) Based on the factual record before him, Judge Huot concluded that "membership in the Fraternal Order of Police or Policemen's Benevolent Association will not affect the functions of probation." (62a, 80a)

Next, Judge Huot addressed the relationship of a probation officer to the probationer if affiliation/membership were to be allowed. Since probation is essentially a "prison without walls", (64a) the relationship between a probation officer and a probationer is already defined as one of supervision and enforcement. (64a, 81a) Thus, Judge Huot properly concluded that "membershp in a police organization will not affect the conduct of the probation officer toward the probationer." (65a)

Specifically, probation officers in their day-to-day duties perform more law enforcement functions such as protecting the citizenry with electronic monitoring and field surveillance of convicted felons on probation and network now more than ever with various law enforcement agencies and groups.

A comparison between probation and parole further supports the position that the probation function has a large law enforcement component. Probation officers, like parole officers, receive law enforcement training, perform searches and seizures, have the power to arrest under

N.J.S.A. §2C:45-3, have the statutory power of "constables" (see N.J.S.A. §2A:162-11 and N.J.S.A. §2A:154-2), and counsel probationers and parolees. Upon until the early 1970's, probation officers were permitted to carry handguns. The fact that the AOC no longer permits probation officers to currently carry firearms should not negate the statutory police duties that they perform. Probation officers are issued chemical mace, kell lights, bulletproof vests and handcuffs as weapons and protective devices. In New Jersey there are individual probation officers who have made as many as 500 arrests over the last several years.

In many other states, including Florida and Delaware, the functions of parole and probation are combined. These employees are associated with police organizations. Judge Huot specifically found that the "experience in other states wherein the function of probation and parole are united in one department and often in one officer has not demonstrated any adverse impact upon the function of probation." (62a, 80a)

With regard to the future of probation, Judge Huot grounded his projections in the current factual realities, "the prison population has doubled between 1980 and 1993 and probation case loads have quadrupled. (64a, 81a) While criminal conduct continues to increase and as probation staffing fails to increase, the function of supervision will remain the primary function of the probation officer." (64a, 81a)

Judge Huot also dealt with the issue of the effect of a probation's perception of a probation officer if the probation officer is affiliated with a law enforcement organization. On this specific issue, Judge Huot found that "probationers view the probation officer as involved in enforcing good behavior rather than as an instrument for rehabilitation." (65a) Judge Huot found that probationers "currently look upon probation officers as enforcers of the court order." (65a) Thus, Judge Huot made a factual determination that "membership in the FOP or PBA will not affect the view of the probationer toward the probation officer." (65a)

On the issue of the public perception, Judge Huot found that the public and community favor punishment over rehabilitation. Since the punitive aspect of probation is favored over any rehabilitative function, Judge Huot properly concluded that "membership [of probation officers in a police organization] would be applauded and that the impact on the public would be a favorable one." (66a)

In sum, Judge Huot concluded that membership in a law enforcement organization would have a positive effect on morale thereby enhancing the functions of probation and would not adversely affect the conduct of the individual probation officer towards the probationer, the attitude or perception of the probationer towards the officer and the perception of the public towards the probation function.

Respondent claims that Judge Huot failed to make a true factual determination on the issues presented to him. However, as previously discussed, Judge Huot did make

factual determinations on the central issues; the most central issue being that probation officer affiliation and/or membership in police organization will have no adverse impact on the probation function or the perception of probation officers in the eyes of the probationers and the public. In fact, membership and/or affiliation of probation officers in law enforcement organizations will enhance both the probation function and the perception.

On July 8, 1994, Respondent issued its decision. (88a) Despite specific factual findings by Judge Huot to the contrary, Respondent decided to reaffirm its policy prohibiting probation officers from membership and/or affiliation in law enforcement organizations. In its decision, Respondent states the real reason underlying its policy prohibiting membership and/or affiliation of probation officers in law enforcement organizations. "[W]e are not restricting some theoretically possible identification of probation officers with police: we are in fact resisting a most concrete and substantial attempt to bring those two forces – police and probation – closer to unification." (98a) The true reason for Respondent's policy decision is not a fear that such affiliation and/or membership will adversely affect the impartiality of the probationary function, but rather, a fear that allowing affiliation and/or membership could be viewed as an implicit acceptance by the Respondent of a transformation of the probation function to one of law enforcement. There is no evidence in the record to support this fear.

On the issue of PANJ's affiliation with the PBA, Respondent found that such affiliation would "compromise probation's impartiality and would be inconsistent with [Respondent's] basic conclusion that the probation

and police functions are fundamentally incompatible." (110a) This conclusion is grounded on nothing more than assumptions and speculation. In fact, Respondent goes on to say that "we cannot say from this record precisely what the effects are of PANJ and probation officers being 'subject to the jurisdiction of the PBA'." (112a)

There already exists an "entanglement" between probation officers and police. There are presently between 700 to 800 probation officers who are members of the FOP. (74a, 82a) Probation officers have been members of the FOP for over 20 years. (82a) Moreover, Respondent acknowledged that cooperation exists between probation and police and that such cooperation is necessary and "strongly encourage[d]." (92a) Basically, Respondent reaches a conclusion that impartiality would be adversely affected but it cannot point to any specific function that would be affected, perception that would be affected, or whether any adverse impact would result from such membership and/or affiliation.

The record before Judge Huot also demonstrates that probation officers are members of the PBA and represented by the PBA in other states. There has been no adverse effect on the probation function in those states. The evidence presented, the factual findings made by Judge Huot, and the lack of empirical evidence to the contrary, all support Petitioner's position that affiliation/membership and impartiality are not incompatible and may co-exist without fear of infringement on judicial impartiality.

Petitioner brought a complaint in the United States District Court for the District of New Jersey seeking

injunctive relief for violations by the Respondent of PANJ's right of association protected by the First and Fourteenth Amendments under 42 U.S.C. §1983, its right to join and assist any employee organization as set forth in the New Jersey Employer-Employee Relations Act, N.J.S.A. §34:13A-1 *et seq.*, and right to organize through representatives of its own choosing as guaranteed by Article I, paragraph 19 of the New Jersey Constitution. This action was consolidated later with an action brought by seven named probation officers including Robert Kirchgessner, Jr. ("Kirchgessner Petitioners"). Upon receipt of the complaint, the Respondent filed a cross motion to dismiss Petitioners' action.

By letter opinion and order dated April 28, 1995, the District Court granted Respondent's dismissal motion and denied Petitioner's motion for a preliminary injunction. (4a) The court did so on the basis that probation officers, as employees of judicial branch of government, must be perceived as impartial, and their association with police officers who are members of executive branch of government would harm that perception.

The District Court's ruling was appealed to the United States Court of Appeals for the Third Circuit, which affirmed the ruling without substantive explanation. (1a)

A motion for rehearing was thereafter timely filed, but was denied by order dated August 21, 1996. (50a)

Petitioner now seeks the review of this Court.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE STANDARD OF REVIEW IN DETERMINING WHETHER PUBLIC EMPLOYEES' FIRST AMENDMENT RIGHT OF ASSOCIATION WAS VIOLATED. SPECIFICALLY, THIS COURT SHOULD CLARIFY WHETHER THE STRICT SCRUTINY TEST IN *ELROD v. BURNS*, 427 U.S. 347 (1976) SHOULD BE APPLIED OR THE BALANCING TEST IN *PICKERING v. BOARD OF EDUCATION*, 391 U.S. 563 (1968) SHOULD BE APPLIED TO PETITIONER'S CASE WHICH INVOLVES PROBATION OFFICERS' RIGHT OF AFFILIATION/MEMBERSHIP IN LAW ENFORCEMENT ORGANIZATIONS

The primary issue in this matter is the standard of review in determining whether Petitioner's First Amendment right of association was violated. It is axiomatic that in cases involving the First Amendment associational rights of public employees, a government action which infringes on those rights will be struck down unless the state action meets the stringent "strict scrutiny" test. *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Illinois*, 497 U.S. 61 (1990). In deciding that *Elrod* and its progeny are narrowly applied only to public employees' associational rights involving political party affiliation or non-affiliation, the Court of Appeals completely misread those cases and "has applied an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

In *Elrod*, plaintiffs, employees of the Sheriff's office who were known members of the Republican party were

discharged or threatened with discharge when a Democrat was elected to the Sheriff's office. In utilizing the strict scrutiny standard, this Court upheld plaintiffs' claim for relief on the basis that the freedom to associate with others for the common advancement of political beliefs and ideas is protected by the First and Fourteenth Amendments. *Id.* at 357.

In *Elrod,* this Court explicitly ruled that:

> It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct. . . . " Thus encroachment "cannot be justified upon a mere showing of a legitimate state interest." The interest advanced must be paramount, one of vital important, and the burden is on the government to show the existence of such an interest.

Id. at 362. (citation omitted)

Nevertheless, the Court of appeals held that the "strict scrutiny" test should not be applied to the instant case by simply saying that *Elrod* is factually different from this case. This ruling, in effect, limited the scope of public employees' associational right under the First Amendment and furthermore "emasculate[d] the principles set forth in *Elrod." Branti, supra,* at 516. Instead, the Court of Appeals incorrectly applied a less restrictive standard that balances "the interest of the [employee], as a citizen, in commenting upon matters of public concern

and the interest of the State, as an employer, in promoting the efficiency of the public services it preforms through its employees." In support of this test, the Court of Appeals cited *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Meyers*, 461 U.S. 138 (1983). Applying the *Pickering/Connick* balancing test to the instant case, the Court of Appeals justified the Respondent's encroachment of the First Amendment associational right of Petitioner by ruling that Respondent has a legitimate interest, avoiding the appearance of impartiality.

Both *Pickering* and *Connick* involved freedom of speech not freedom of association. In *Connick*, an assistant district attorney was terminated for circulating a questionnaire concerning the office's transfer policy. In *Pickering*, a teacher was fired for sending a letter to a newspaper critical of the school in which she worked. In both of those cases, this Court balanced the government's interest against the employee's First Amendment rights. In cases involving free speech, the appropriate test is a balancing test like the one used in *Pickering* and *Connick*.

Here, however, the issue is not one of freedom of speech, but rather, one of freedom of association. Where associational issues are involved, this Court has applied a different test. That test requires that infringements on constitutional freedom of association rights must serve a compelling state interest. *Elrod, supra.*

For instance, in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), this Court addressed the issue of a Minnesota state law which compelled the Jaycees to accept women as regular members. The Jaycees challenged this

statute on the basis that it unconstitutionally infringed upon the Jaycees' freedom of association.

The *Roberts* Court distinguished between freedom of speech and freedom of association cases. Freedom to associate is a derivative of freedom to speak. Specifically, the *Roberts* Court stated that "an individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Id.* at 622. Thus, "implicit in the right to engage in activities protected by the First Amendment [is the] right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.*

In addressing the issue of the right to associate, the *Roberts* Court applied the compelling state interest test. Specifically, the *Roberts* Court stated that "infringements on [the right to associate] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623. Based on the two part compelling state interest test, the *Roberts* Court found that Minnesota's "compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms." *Id.*

In *NAACP v. Button*, 371 U.S. 415 (1963), this Court found a Virginia statute prohibiting the association of the

NAACP, its members, and its staff attorneys from soliciting business in order to institute litigation challenging segregation in Virginia to be unconstitutional. Virginia argued that the NAACP's activities in furtherance of litigation were improper solicitation under the state statute which regulates professional conduct. In determining whether this statute was constitutionally impermissible, the *NAACP* Court applied the same test that it always applied in associational cases. Specifically, the *NAACP* Court stated "the decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *Id.* at 438. The *NAACP* Court specifically rejected Virginia's proffered reasons for the statute, *i.e.*, prohibiting professional misconduct, not infringing on free expression. "A State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 439. Moreover, citing *Bates v. Little Rock*, 361 U.S. 516 (1960), the *NAACP* Court held "where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Id.* This requirement must be set even if the abridgement of such rights was unintended. *Id.*

This case is strikingly similar to *NAACP v. Button*. Here, Respondent, under the guise of prohibiting partiality, in appearance and in fact, has ignored the constitutional rights of PANJ and its members. While PANJ does not dispute that the Respondent may regulate probation officers' conduct which jeopardizes impartiality,

the means by which the Respondent has sought to prohibit partiality unconstitutionally infringes upon PANJ's rights in light of the requirement by this Court that Respondent show a compelling interest which cannot be achieved through less intrusive means. In short, the "State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from [probation officers'] activities, which can justify the broad prohibitions which it has imposed." *NAACP* at 444.

This strict scrutiny test has been applied to cases involving public employees' First Amendment associational rights to join the union. *See, Smith v. Arkansas State Highway Employees, Local 1315,* 441 U.S. 463, 465 (1979). ("The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so.") (per curiam); *Professional Ass'n of College Educators, TSTA/NEA v. El Paso County Comm. College Dist.,* 730 F.2d 258, 262 (5th Cir.), *cert. denied,* 469 U.S. 881 (1984) ("Right of association under the First Amendment encompasses right of public employees to join unions and thus the First Amendment is violated by state action whose purpose is either to intimidate public employees from joining union or from taking an active part in its affairs or to retaliate against those who do."); *Mescall v. Rochford,* 655 F.2d 111, 113 (7th Cir. 1981) ("The identity of the union which the [public employees] seek to join or with which they seek affiliation cannot constitutionally be the basis for limitation on their freedom of association.")

Finally, even Respondent acknowledge that the appropriate test for association cases is one of strict

scrutiny. In specifically addressing the issue of infringement on Petitioner's associational rights, the Respondent stated:

> Associational rights are precious and should not be restricted without reason. *But where important legitimate interests are involved, compelling interest,* government must be practical in its protection of those interests. (119a) (Emphasis added).

Thus, even Respondent admits that their interests must be compelling. To now state that a different test, a balancing test, should be applied is disingenuous.

In sum, this Court and other lower courts' decisions addressing the specific issue of associational rights used the two part compelling interest test. In its July 8, 1994 determination, Respondent applied the compelling interest test on the issue of the associational rights of probation officers. Accordingly, the District Court and the Court of Appeals erred when they improperly rejected the strict scrutiny test and applied the balancing test on the issue of Petitioner's right to affiliate with and/or become members of law enforcement organizations. As a result, Petitioner's First Amendment right of association was unduly encroached.

It is respectfully requested that, by granting a writ of certiorari, this Court should clarify the standard of review in determining whether public employee's First Amendment right of association was violated.

II.

CERTIORARI SHOULD BE GRANTED TO RECTIFY A RULING BY THE COURT OF APPEALS FOR THE THIRD CIRCUIT THAT CONFLICTS WITH THIS COURT'S RECENT DECISION IN *UNITED STATES v. NATIONAL TREASURY EMPLOYEES UNION*, 513 U.S. ___ (1995) IN WHICH THIS COURT REQUIRED A HIGHER LEVEL OF SCRUTINY THAN IN *PICKERING/CONNICK* BALANCING TEST WHEN THE MATTER INVOLVES A WHOLESALE BLANKET BAN TO A BROAD CATEGORY OF EXPRESSION BY A MASSIVE NUMBER OF POTENTIAL SPEAKERS AND ALSO REQUIRED THE GOVERNMENT TO SHOW THAT THE RECITED HARMS ARE REAL, NOT MERELY CONJECTURAL

It is Petitioner's contention that the appropriate standard for reviewing Respondent's actions is one of strict scrutiny. As submitted in Point I, in cases involving freedom of association, this Court and other lower courts have applied the strict scrutiny test which requires a compelling state interest to abridge a First Amendment right. Even assuming, *arguendo*, that the *Pickering/Connick* balancing test applies, the Court of Appeals incorrectly applied it to the instant case in light of this Court's recent decision in *United States v. National Treasury Employees Union*, 513 U.S. ___, 130 L. Ed. 2d 964, 115 S. Ct. 1003 (1995).

The key issue in this matter, under the *Pickering* and *Connick* balancing test, is whether the Respondent's interest in avoiding the risk of impartiality outweighs Petitioner's First Amendment right to affiliate with the State PBA. Clearly, it does not.

The Special Master presided over five days of hearings in which Respondent was given an opportunity to present testimony and evidence in support of their interest in prohibiting probation officers from becoming members of or affiliating with a law enforcement organization. However, Respondent could not point to any specific evidence at the hearing to support their claim that the "risk" to impartiality grants them carte blanche to infringe upon important First Amendment rights. In fact, Respondent admits, through the testimony of Assistant Director Harvey Goldstein, that "the influence of membership and affiliation on the conduct of probation officers . . . [is] subtle and, as a practical matter, largely *undetectable* and *unprovable* given the nature of probation work and the broad discretion vested in a probation officer." (95a) (Emphasis added). Respondent failed to produce any evidence or testimony which would support their infringement on Petitioner's constitutional rights.

On the other hand, the evidence produced by Petitioner at the hearing refute each of the concerns expressed by Respondent. Specifically, based on the evidence presented, the Special Master found that "membership in the Fraternal Order of the Police or Policemen's Benevolent Association will not affect the functions of probation." (62a, 80a) Moreover, "membership in the FOP or PBA will not affect the view of the probationer toward the probation officer." (65a) Since the function of probation would not be affected, and the view of a probationer toward a probation officer would not be affected by the Petitioners' affiliation with the State PBA, the Special

Master concluded that there cannot be a generalized prohibition against probation officers becoming members of or being affiliated with law enforcement organizations.

The most alarming aspect about Respondent's affiliation prohibition is that they admit that their decision is not based on any hard evidence, but rather, on an unsupported belief. For instance, Respondent admits that they "cannot say from this record precisely what the effects are of PANJ and probation officers being subject to the jurisdiction of the PBA." (112a) Respondent points to nothing more than beliefs ("we *believe* the affiliation membership itself, along with the PBA's constitution and goals, is evidence of its likely impact on the probation officers") (115a) and predictions ("certainly the impact of being affiliated with the PBA on each probation officer who is a member cannot be *predicted* with any confidence . . . [b]ut the [Respondent] can *predict* that it will have some impact on all such probation officers . . . ") (115a) without pointing to one single piece of evidence in the record to substantiate this. (Emphasis added).

However, this Court, in a case involving the First Amendment rights of federal employees, recently ruled that the government "must demonstrate that the recited harms are real, not merely conjectural, and that regulation will in fact alleviate harms in a direct and material way." *Id.*, 513 U.S. at ___, 130 L. Ed. 2d at 985, 115 S. Ct. 1003 at ___, *citing, Turner Broadcasting System, Inc. v. FCC*, 512 U.S. ___, ___, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994).

In *United States v. National Treasury Employees Union*, this Court addressed the issue of a federal government

ban on lower salary grade employees of the federal government's Executive Branch accepting an honorarium for making appearances or speeches or writing articles. The government argued that its interest in prohibiting federal officers from misusing or appearing to misuse their powers by accepting compensation for their unofficial and non-political writing and speaking activities outweighs those employees' First Amendment rights. However, in *Treasury Employees,* as in this case, the government failed to cite any evidence of misconduct related to the receipt of honoraria. The government's ban on honoraria was not taken in response to actual speech. Thus, it banned potential speech before it happened. Similarly, the affiliation prohibition is not taken in response to actual harms associated with affiliation, but bans affiliation before it happens.

In striking down the ban on honorarium as violating the federal employees' First Amendment rights, this Court applied the *Pickering/Connick* balancing test. This Court found that the government was required to show that the "interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government." *Treasury Employees,* 130 L. Ed. 2d at 980-81. The only argument proffered by the government in support of its ban on honoraria was that "a wholesale prophylactic rule is easier to enforce than one that requires individual . . . determinations." *Id.* at 984. Respondent has taken a similar position. A prophylactic prohibition against probation officers becoming members of or affiliating with a law enforcement organization has

been implemented only because Respondent does not believe their own administrative arm, the AOC, is capable of monitoring individual probation officers' activities. However, this Court rejected such a blanket ban. Specifically, "a blanket burden on the speech of [public] employees requires a much stronger justification than the Government's dubious claim of administrative convenience." *Id.* This Court also noted that where the statute in question constitutes a wholesale ban to a broad category of expression by a massive number of potential speakers, the government's burden is even greater than it was in *Pickering* and its progeny which involved individual disciplinary actions taken in response to particular government employees' actual speech. *Id.*

Lastly, this Court gave great weight to the "powerful and realistic presumption that the federal workforce consists of dedicated and honorable civil servants." *Id.* at 986. The Court of Appeals ignored the same findings of the Special Master with respect to probation officers.

The courts below did not follow the reasoning behind this Court's conclusion in *Treasury Employees* that "the speculative benefits the honoraria ban may provide the Government are not sufficient to justify this crudely crafted burden on Respondents' freedom to engage in expressive activities." *Id.* As a result, the Court of Appeals has decided "an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

Certiorari, therefore, should be granted to rectify the ruling that conflicts with this Court's decision in *Treasury Employees.*

III.

CERTIORARI SHOULD BE GRANTED TO RECTIFY A RULING BY THE UNITED STATES FOR THE THIRD CIRCUIT THAT PETITIONER'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION CANNOT BE PROTECTED BECAUSE THIS CASE INVOLVES ONLY THE ANNOUNCEMENT OF POLICY, NOT THE TERMINATION OF EMPLOYMENT, THIS COURT SHOULD RECTIFY THE LOWER COURT'S UNDUE LIMITATION OF THE SCOPE OF THE DUE PROCESS RIGHTS PROTECTION

Petitioner's due process rights under the Fourteenth Amendment were violated by Respondent's policy of prohibiting membership in and affiliation with the FOP and State PBA. By refusing to grant relief on this claim, the courts below incorrectly applied the well-established rule set forth by this Court.

The Fourteenth Amendment prohibits any state from depriving "any person of life, liberty or property, without due process of law." U.S. Const. amend. XIV, §1. In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), this Court ruled that in order to come under the umbrella of due process protections, plaintiff must show a property interest and an entitlement to that interest. Property interests in continued employment "are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law." *Id.*

Petitioner has amply set forth the basis for a claim of a property or liberty interest. The New Jersey State Constitution provides that probation officers have the "right to organize, present to and make known to the state or

any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing." N.J. Const. art. 1 ¶ 19. In addition, Respondent entered into an agreement with PANJ and other labor organizations in which they agreed to be subject to the jurisdiction of the Public Employment Relations Commission (PERC) on issues involving the New Jersey Employer-Employee Relations Act. The Act specifically provides that "public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity." N.J.S.A. §34:13A-5.3.

PANJ members voted overwhelmingly to affiliate with the State PBA. PANJ members did so pursuant to the property and liberty rights guaranteed to them under the New Jersey Constitution and the PERC statute. By prohibiting such affiliation with the State PBA, Respondent ignored the clear constitutional mandate that "the choice of a representative of the public sector [including probation officers] be uncoerced and free." *Lullo v. Int'l Ass'n of Fire Fighters*, 55 N.J. 409, 423 (1970).

In addition, Respondent violated Petitioner's procedural due process rights in that while Petitioner was given notice and a hearing regarding Respondent's policy, the hearing was not before a tribunal which was impartial or disinterested. It was before a Special Master appointed by Respondent.

As further evidence of Respondent's procedural due process violation, the rejection of Judge Huot's decision regarding Respondents' policy provides further support

that Petitioner's procedural due process rights were violated. As discussed at length in the Statement of the Case, *supra*, Judge Huot found that affiliation/membership in law enforcement organizations has not and will not affect the probation function, except to enhance it. Respondent, however, implemented its prohibition against PANJ affiliation with the State PBA in spite of the fact that there was no empirical evidence to conclude that such affiliation would adversely affect the performance of probation officers' duties or the impartiality of the judiciary.

The Court of Appeals in this matter distinguished the termination of employment from the announcement of the policy and ruled that due process rights are applied only to the case of employment termination. This decision, however, has no basis in law or fact. Plainly, to the members of PANJ, it is meaningless to distinguish the termination of employment from the announcement of the policy because probation officers were threatened with termination if they did not follow the policy of the Respondent. (91a) In fact, after Respondent announced the policy prohibiting probation officers' affiliation/membership in law enforcement organizations, the AOC made it clear that "failure to comply with [this policy] will result in disciplinary action." (126a)

As a result, the courts below unduly limited the scope of applying the due process rights under the Fourteenth Amendment and failed to protect Petitioner's constitutional rights.

Accordingly, certiorari should be granted to rectify the incorrect application of Petitioner's due process rights under the Fourteenth Amendment.

IV.

CERTIORARI SHOULD BE GRANTED TO RECTIFY A RULING BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT THAT FAILED TO CONSIDER EXTRAORDINARY CIRCUMSTANCES IN THIS MATTER IN DETERMINING WHETHER TO EXERCISE SUPPLEMENTAL JURISDICTION OVER STATE LAW CLAIMS EVEN IF ALL FEDERAL CLAIMS ARE DISMISSED

Petitioner alleged in its complaint that Respondent violated Petitioner's rights under New Jersey state law. The District Court and the Court of Appeals in this matter refused to exercise supplemental jurisdiction over Petitioner's state law claims even though all federal claims were dismissed. In light of the extraordinary circumstances the Petitioner faces in this matter, this ruling should be reviewed by this Court.

The District Court may exercise supplemental jurisdiction over state law claims even if all federal claims are dismissed when extraordinary circumstances warrant the retention of jurisdiction. *Cito v. Bridge Tp. Police Dept.*, 892 F.2d 23, 26 (3d Cir. 1989); *see also Purgess v. Sharrock*, 33 F.3d 134 (2d Cir. 1994) ("District Court did not abuse its discretion by exercising supplemental jurisdiction over state claims after dismissal of last federal claim at conclusion of defendant's case."); *Baker v. Farmers Elec. Co-op., Inc.*, 34 F.3d 274 (5th Cir. 1994) ("Pendent jurisdiction may continue even after federal claims upon which jurisdiction is based have been dismissed or rendered moot."). Moreover, this Court, as a general proposition, mandates that in exercising its discretion, a court must consider the principles of comity, judicial economy, convenience and

fairness to the litigants. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349 (1988).

This matter is replete with extraordinary circumstances which require the exercise of supplemental jurisdictional authority. Here, Petitioner is challenging a policy of the New Jersey Supreme Court, the court that oversees all state court and administrative actions. Since supplemental jurisdiction was not exercised, Petitioner is left without a forum in which to pursue its claim.

Other extraordinary circumstances exist which warrant supplemental jurisdiction. Petitioner claims that the Respondent's action violates the New Jersey State Constitution which guarantees public employees the right to have representatives of their own choosing. Respondent's action also violates an agreement in which the Respondent agreed to abide by the New Jersey Employer-Employee Relations Act which enforces Petitioner's constitutional right to representatives of its own choosing. The New Jersey Constitution and PERC statute simply set forth New Jersey public policy on the right to choose one's own representative. Respondent's prohibition against affiliation with or membership in law enforcement organizations is contrary to this public policy. *See Lullo v. Int'l Ass'n of Fire Fighters*, 55 N.J. 409, 423 (1970).

These considerations, as well as equity and judicial fairness mandate that supplemental jurisdiction be exercised.

The Court of Appeals, however, failed to consider these extraordinary circumstances in deciding on Petitioner's supplemental jurisdiction claims and thereby

failed to protect Petitioner's rights under New Jersey state law.

Certiorari, therefore, should be granted to rectify the lower courts' failure to consider supplemental jurisdiction based on extraordinary circumstances in this matter.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A – Order of the United States Court of Appeals for the Third Circuit Filed July 19, 1996 .... 1a

Appendix B – Opinion of the United States District Court for the District of New Jersey Filed April 28, 1995 ..... 4a

Appendix C – Order of the United States Court of Appeals for the Third Circuit Filed August 21, 1996 ..... 50a

Appendix D – Report of Special Master Concerning Probation Officers' Membership in Law Enforcement Organization and Proposed Affiliation of PANJ with the PBA Issued March 28, 1994 ..... 52a

Appendix E – Decision of the Supreme Court of New Jersey Concerning Probation Officers' Membership in Law Enforcement Organization and Proposed Affiliation of PANJ with the PBA Issued July 8, 1994 ..... 88a

Appendix F – Directive of the Administrative Office of the Courts, State of New Jersey Concerning Probation Officers' Membership in Law Enforcement Organizations Issued December 7, 1994 ..... 125a

APPENDIX A

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5328; No. 95-5329

ROBERT A. KIRCHGESSNER, JR.; MICHAEL KRANYAK; ANDY KAFEL; JACK TOMASELLI; CHARLES BENE; MAUREEN COOL; BILL SHEERAN; PROBATION OFFICERS/FOP MEMBERS ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; THE PROBATION ASSOCIATION OF NEW JERSEY

Appellants

v.

ROBERT N. WILENTZ; ROBERT L. CLIFFORD; ALAN B. HANDLER; STEWART G. POLLOCK; DANIEL J. O'HEARN; MARIE L. GARIBALDI; GARY S. STEIN, IN THEIR OFFICIAL CAPACITIES AS JUSTICES OF THE SUPREME COURT OF NEW JERSEY

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil Nos. 94-05973, 94-06375)
District Judge: Hon. Alfred J. Lechner, Jr.

Submitted Under Third Circuit LAR 34.1(a)
March 11, 1996

Before: NYGAARD, SAROKIN, *Circuit Judges*, and ALDISERT, *Senior Circuit Judge*

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court entered August 10, 1995 be and is hereby AFFIRMED.

Costs taxed against appellants.

BY THE COURT

/s/ Richard L. Nygaard
Circuit Judge

ATTEST:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

Dated: JUL 19 1996

Cost Taxed In Favor of Appellee as follows:

Total for Brief	**$118.80**
Total	**$118.80**

Certified as a true copy and issued in lieu of a formal mandate on 8/29/96.

Teste: /s/ Bradford A. Baldus
Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CHAMBERS OF
ALFRED J. LECHNER, JR.
JUDGE

MARTIN LUTHER KING JR
FEDERAL BUILDING &
U S COURTHOUSE
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28 April 1995

NOT FOR PUBLICATION

LETTER-OPINION
ORIGINAL FILED WITH THE CLERK OF THE COURT

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Re: Robert Kirchgessner, Jr., Michael Kranyak, Andy Kafel, Jack Tomaselli, Charles Bene, Maureen Cool, Bill Sheeran, Probation Officers/ FOP Members on behalf of themselves and all others similarly situated v. Robert N. Wilentz, Robert L. Clifford, Alan B. Handler, Stewart G. Pollock, Daniel J. O'Hern, Marie L. Garibaldi and Gary S. Stein, in their official capacities as Justices of the Supreme Court of the State of New Jersey and,
Probation Association of New Jersey, a New Jersey Corporation v. Robert N. Wilentz, Robert L. Clifford, Alan B. Handler, Stewart G. Pollock, Daniel J. O'Hern, Marie L. Garibaldi and Gary S. Stein, in their official capacities as Justices of the Supreme Court of the State of New Jersey

Civil Action No. 94-5973 (AJL)

Counsel:

This is a consolidated action consisting of an action brought by seven named probation officers including one Robert Kirchgessner, Jr.[1] (the "Kirchgessner Plaintiffs"),

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[1] The other named plaintiffs include Michael Kranyak, Andy Kafel, Jack Tomaselli, Charles Bene, Maureen Cool and Bill Sheeran.

as members of a putative class of all present and future probation officers employed by the State of New Jersey, *see* Kirchgessner Plaintiffs' Verified Class Action Complaint and Jury Demand (the "Kirchgessner Complaint"), and Exhibits A through C, and an action brought by the Probation Association of New Jersey ("PANJ"), the employee representative for some 1500 probation employees throughout New Jersey. *See* PANJ's Verified Complaint, Civil Action Number 94-6375 (AJL) (the "PANJ Complaint"), and Exhibits A through D. The Kirchgessner Plaintiffs and PANJ (collectively, the "Plaintiffs") commenced their actions against the seven justices (the "Chief Justice" and the "Associate Justices" or the "Defendants") of the Supreme Court of the State of New Jersey (the "New Jersey Supreme Court"), in their official capacities, seeking by way of injunctive relief to enjoin the policy of the New Jersey Supreme Court prohibiting probation officer membership in police organizations. Jurisdiction is alleged pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343 and 29 U.S.C. § 102. Kirchgessner Complaint, ¶¶ 2-3; PANJ Complaint, ¶ 4.

On 15 December 1994, the Kirchgessner Plaintiffs made an application for an accelerated return date and a preliminary injunction (the "Preliminary Injunction Application"). *See* transcript of Preliminary Injunction Application, dated 15 December 1994 (the "Preliminary Injunction Application Tr."). Counsel for the Defendants was given notice of the Preliminary Injunction Application on 14 December 1994. *Id.* at 3.

In light of the limited opportunity counsel for the Defendants had to present opposition and because the Kirchgessner Plaintiffs sought to enjoin the New Jersey

Supreme Court concerning an opinion issued more than five months earlier on 8 July 1994 (the "8 July 1994 Opinion"), attached as Exhibit A to the Kirchgessner Complaint and Exhibit C to the PANJ Complaint, the Preliminary Injunction Application was denied on 15 December 1994. Preliminary Injunction Application Tr. at 3-5. The Kirchgessner Plaintiffs were instructed to proceed with their motion for injunctive relief pursuant to Rule 12N, Appendix N of the General Rules Governing the United States District Court for the District of New Jersey. *Id.* at 4-6.

On 3 January 1995, PANJ filed an order to show cause (the "Order to Show Cause"), seeking a declaratory judgment, preliminary and permanent injunction against the Chief Justice and the Associate Justices in connection with the 8 July 1994 Opinion. A letter was forwarded to counsel for PANJ, with copies to counsel for the Kirchgessner Plaintiffs and counsel for the Defendants, dated 4 January 1995 (the "4 January 1995 Letter") stating:

> As explained on 15 December 1994 to counsel in the *Kirchgessner* matter, based upon the chronology of the events related to these cases, as well as the timing of the applications for injunctive relief, . . . there is no reason to proceed in an emergent manner. The relief sought requires deliberate action and the [D]efendants should have a fair and adequate opportunity to respond to a request for injunctive relief, as sought in each of these matters.

4 January 1995 Letter at 2. Additionally, the 4 January 1995 Letter advised that it was the court's inclination to

consolidate the matters and have the Kirchgessner Plaintiffs and PANJ jointly brief the injunctive relief issue to avoid a duplication of effort. *Id.*

At a status conference, dated 12 January 1995, the action commenced by PANJ, was consolidated with the matter filed by the Kirchgessner Plaintiffs. *See* Order of Consolidation, dated and filed 12 January 1995. Thereafter, a return date and hearing were scheduled for 17 April 1995 (the "17 April Hearing"). *See* transcript of the 17 April Hearing, dated 17 April 1995 (the "17 April Hearing Tr.").

Currently before the court is the Plaintiffs' motion for a preliminary injunction to enjoin the New Jersey Supreme Court, the Chief Justice and the Associate Justices, from enforcing a policy, as articulated in the 8 July 1994 Opinion; this policy prohibits probation officer membership in law enforcement organizations. Also before the court is the cross-motion by the Chief Justice and the Associate Justices to dismiss for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rule 12(b)(6)").[2]

---

[2] In support of their motion for a preliminary injunction and in opposition to the motion to dismiss by the Chief Justice and the Associate Justices, the Plaintiffs submitted: PANJ's Supplemental Brief in Support of Order to Show Cause for Preliminary Injunction (the "PANJ Brief"); Brief in Support of Kirchgessner Plaintiffs' Motion for a Preliminary Injunction (the "Kirchgessner Brief"); Reply Brief of Plaintiff, Probation Association of New Jersey's Order to Show Cause for Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss Plaintiff's Complaint (the "PANJ Reply Brief"); Reply Brief in Support of Kirchgessner Plaintiffs'

For the reasons set forth below, the motion by Plaintiffs for a preliminary injunction is denied. The cross-motion by the Chief Justice and the Associate Justices to dismiss is granted as to the Plaintiffs' Federal causes of action; supplemental jurisdiction is not exercised concerning the Plaintiffs' state law causes of action.

Facts

In October and November 1993, PANJ passed a referendum to affiliate itself with the Policeman Benevolent Association of New Jersey (the "State PBA"). PANJ Complaint, ¶ 28. In September of 1994, the State PBA agreed to become affiliated with the PANJ, if such affiliation was not prohibited by law. *Id.*, ¶ 30. Additionally, many of the Plaintiffs were, at that time, members of the Fraternal

---

Motion for a Preliminary Injunction and in Opposition to Defendant's Motion to Dismiss Plaintiffs' Complaint (the "Kirchgessner Reply Brief"); Kirchgessner Plaintiffs' Appendix; Affidavit of Rich Walen; Affidavit of Maureen Cool; Affidavit of George Christie in Support of Plaintiff Probation Association of New Jersey's Order to Show Cause for Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss Plaintiff's Complaint; Plaintiff Probation Association of New Jersey's Appendix in Support of Order to Show Cause for Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss Plaintiff's Complaint, Volumes I and II.

In opposition to Plaintiffs' motion for preliminary injunction and in support of their motion to dismiss, the Chief Justice and the Associate Justices submitted: Brief in Support of Motion to Dismiss and in Opposition to Motion for Preliminary Injunction (the "Defendants Brief"); Defendants' Letter Brief Addendum in Support of Motion to Dismiss and Opposition to Motion for Preliminary Injunction (the "Defendants Addendum"); Affidavit of Mark A. Rosenbaum.

Order of Police (the "FOP"). Kirchgessner Complaint, ¶¶ 9-14; PANJ Complaint, ¶ 32.

On 3 March 1994, in response to a request made by the Chief Probation Officers' Association, the New Jersey Supreme Court announced it would review its longstanding policy prohibiting probation officer membership in law enforcement organizations, namely the State PBA and the FOP. *See* Letter from the New Jersey Supreme Court, dated 3 March 1994 (the "3 March 1994 Letter"), attached as Exhibit A to the PANJ Complaint at 1. The New Jersey Supreme Court appointed retired Superior Court Judge Paul R. Huot, as a special master (the "Special Master"), to develop a factual record to aid in its review of this matter. *Id.*

In the 3 March 1994 Letter, the New Jersey Supreme Court explained: "In the meantime, the present policy remains in effect: probation officers shall not become members of any law enforcement organization. . . . [F]or the time being the policy shall not require those probation officers who are currently members of [the] FOP to resign." *Id.* at 1-2. Additionally, the 3 March 1994 Letter stated: "The [Supreme Court of New Jersey] wishes to make clear that it recognizes the probation officers' constitutional right to have representatives of their own choosing in connection with collective negotiations." *Id.* at 2.

A. The Report of the Special Master

On 28 March 1994, the Special Master issued his report (the "Report of the Special Master"), attached as Exhibit B to the Kirchgessner Complaint and the PANJ

Complaint, concerning probation officer membership in law enforcement organizations and the proposed affiliation of PANJ with the State PBA. According to the Special Master, there were five questions submitted by the New Jersey Supreme Court for which it sought a factual record and recommended findings of fact. Report of the Special Master at 2. These questions were:

> (1) What impact, if any, will membership of probation officers in the [State PBA] or the [FOP] have on the probation function?
>
> (2) Will the affiliation of PANJ with the State PBA result in membership in the PBA of probation officers who are members of PANJ?
>
> (3) What is the present number of probation officers who are members of the FOP and what have their activities been in connection with that organization?
>
> (4) To what extent, if any, may probation officers become involved in or be seen as supporting political activity as a result of membership in either [the State PBA] or [the FOP]?
>
> (5) Does the legislation (N.J.S.A. [§] 34:13A-5.3) prohibiting, subject to certain exceptions, police officers from joining an employee organization that admits non police to membership [sic] imply any legislative policy related to the potential impact on non-police members of such an organization?

Id.

The Report of the Special Master explained:

> This report does *not* and the assignment of th[e] [S]pecial [M]aster *was not intended* to make findings concerning the question of whether a probation officer was a "law enforcement officer", nor the question of the propriety or right of any "union" to be a representative for collective bargaining purposes of probation officers nor the question of the right of probation officers to join any particular union.

Id. (emphasis in original).

With regard to the impact of membership in police organizations on the probation function, the Special Master determined that the testimony he heard and the evidence submitted "[were] not such that a true factual determination can be made." *Id.* at 3. According to the Special Master: "While a far more detailed and intense study would be required to come to a fully sustainable conclusion based upon empirical data rather than opinions, it would appear that membership in the [State PBA] or [the FOP] will not affect the *functions of probation.*" *Id.* at 5 (emphasis added).

The Special Master explained that there "is no evidence one way or the other" concerning the impact on the function of probation, as well as on the impact on individual probation officers from police officer association membership. *Id.* at 5-6. Instead, the Special Master stated these determinations turn upon the decision maker's view of human nature

> as able to withstand the subtle bribery of friendship or steadfastness in living up to the moral and ethical standards required by a particular

> employment . . . [and] [t]he belief in the professionalism or lack thereof of probation officers as a whole, or an individual probation officer, in the performance of duty and adherence to oath.

Id.

The Special Master was similarly unable to make a generalized determination concerning the impact of joining a police officer association upon the neutrality of probation officers. *Id.* at 7. The Special Master rejected testimony regarding the enhanced cooperation and coordination with law enforcement agencies which would result from membership in the State PBA or the FOP because there was already evidence of such cooperation without probation officer membership in the State PBA or the FOP. *Id.*

The Special Master concluded that affiliation with the State PBA would subject probation officers to the control and regulations of the State PBA. *Id.* at 10. "Probation officers may be placed in a position of supporting or opposing political candidates or legislation which may or may not be in the best interest of probation officers." *Id.* Additionally, the Special Master found affiliation with the State PBA could create a conflict of interest if, for example, the state offers a reward for the arrest and conviction of a defendant convicted of assaulting or killing a State PBA member. *Id.* The Special Master, however, explained:

> This, again is an area where the individual integrity and professionalism of the officer is involved. There is no determination that such membership and such action on the part of the State PBA would cause any officer to fail to properly perform his [or her] duties, it is merely

> the recognition of a possible consequence of affiliation.

Id. at 10-11.

The Special Master determined there are between 700 and 800 probation officers who are members of the FOP, and have been so for twenty years. *Id.* at 13. The Special Master pointed out that the by-laws of the FOP provides it "is strictly non-political and shall have no affiliation with any union or political action committee." *Id.* at 14. According to the Special Master, there was no evidence presented with respect to the nature and quality of the activities of the members of the FOP other than that they participate in social, non-political and non-labor oriented activities.[3] *Id.* The Special Master determined the FOP is not engaged in partisan political activity. *Id.* at 15.

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[3] By letter, dated 11 April 1995 (the "11 April 1995 Letter"), counsel for the Defendants forwarded certain correspondence between the Administrative Office of the Courts of the State of New Jersey (the "AOC") and the Public Employees Relations Commission ("PERC"). According to an attached letter from PERC to the AOC, dated 17 March 1995, the New Jersey FOP Coalition of Probation Officers' Lodges sought to intervene on behalf of probation officers as labor representative in a labor dispute. As counsel for the Defendants point out, the above-referenced correspondence is an "indication that there is some faction of the [FOP] which seeks to be certified as a labor organization representing probation officers." 11 April 1995 Letter.

At the 17 April Hearing, the Plaintiffs explained:

> [R]egardless of whether [the FOP is] engaging in union activities or not, . . . the issue is still the same in terms of their freedom of association. Is that activity going to disrupt the operation of Government in fact or appearance? . . . [We have] never stated that the FOP has never engaged in union activities. In fact,

The Special Master found that the State PBA does, on occasion, engage in partisan political activity. *Id.* The State PBA "may support or oppose candidates for elective office and support or oppose legislation." *Id.*

The Special Master then addressed whether N.J.S.A. § 34:13A-5.3, which prohibits police officers from joining an employee organization which admits non-police officers, implies any legislative policy concerning non-police officers joining police officer organizations. Report of the Special Master at 16.

The Special Master explained that, according to the testimony of the chairman of PERC, the purpose of the statute is to have collective bargaining without divided loyalties and to avoid problems which could arise if police and non-police were members of the same bargaining unit. *Id.* Summarizing PERC's position, the Special Master stated: "Police are to protect person and property, even in a labor dispute. The divided loyalty could arise if a police [officer] was a member of the same union as the employee who was on strike against a non[-]public employer." *Id.*

According to the Special Master, the determination of whether persons are classified as police or non-police under the statute is the function of PERC. *Id.* The Special Master explained that "PERC's jurisdiction does not

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they have engaged in activities for many years in terms of representing their members in disciplinary hearings before police departments and so on.

17 April Hearing Tr. at 24.

extend to the employees of the judicial branch of government[,]" and that it was not his (the Special Master's) duty to interpret or apply the statute to either police officers or probation officers. *Id.*

B. The 8 July 1994 Opinion

In the 8 July 1994 Opinion the New Jersey Supreme Court reaffirmed its policy of prohibiting probation officer membership in law enforcement organizations, the State PBA and the FOP in particular. 8 July 1994 Opinion at 5. The New Jersey Supreme Court explained that the 8 July 1994 Opinion was "quasilegislative, based on . . . policy considerations[,] . . . [its] knowledge of the subject matter[,] . . . [and] derived from [its] responsibility for, . . . authority over, . . . involvement with and . . . regular and continuing regulation and oversight of the Probation Division and its functions and operations."[4] *Id.* at 2. The New Jersey Supreme Court did not

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[4] By letter, dated 17 April 1995 (the "17 April Letter"), counsel for the Defendants explains:

> With respect to probation officers, N.J.S.A. [§] 2A:168-5 provides that their appointment shall be made by the Assignment Judge of the Superior Court in each county. Although, until recently, probation officers were technically on the payroll of the various counties, they have always been subject to supervision by the [j]udiciary. Moreover, pursuant to the State Judicial Unification Act, "judicial employee" is defined as including any person employed by a county probation office, N.J.S.A. 2B:103, and, as of January 1, 1995, all such employees are on the State's payroll. N.J.S.A. 2B:10-4.

17 April Letter at 1.

adopt all of the Special Master's findings, although explaining that its "disagreement [was] not fact-specific, for as [the Special Master] notes the evidence was largely insufficient . . . to reach any such determinations (or as the Special Master noted concerning the central question before us, the evidence was 'not such that a true factual determination can be made')." *Id.* at 3.

According to the New Jersey Supreme Court:

> Our decision rests on the fundamental difference between probation and police organizations. Probation is an integral part of the judiciary; everything that probation does it does as an arm of the judiciary. Among other things, it is the entity that enforces judicial orders. Given the nature and functions of probation, it must be as impartial as the rest of the judiciary, totally so and scrupulously so. Probation cannot take sides any more than a court may, and cannot be perceived as taking sides any more than a court may. . . . It has no more right to become allied with a public defender's office than with prosecutors or police. Probation represents no special interest in society and government but one: the courts.
>
> Police and police organizations have but one interest and one role: law enforcement. Everything they do serves that interest: investigating crime, apprehending criminals, aiding in the prosecution and conviction of the accused, and in the imposition of punishment. The police stand firmly and properly on one side of the scales of criminal justice – the prosecution's side.

> Put simply, the functions of police and probation – one serving the prosecution the other serving the courts – are not only different, but incompatible. Separation of the two is essential to the impartiality of the probation function and to the integrity of the judiciary.

Id. at 3-4.

Consistent with the 8 July 1994 Opinion, the AOC issued a directive, dated 7 December 1994, requiring all probation officers to terminate FOP membership by 1 January 1995 and prohibiting affiliation of PANJ with the State PBA. *See* Exhibit C to the Kirchgessner Complaint; Exhibit D to the PANJ Complaint

C. The Complaints in the Instant Action

The Kirchgessner Complaint consists of six counts. Count One alleges the ban on probation officer membership in the FOP violates the Kirchgessner Plaintiffs' rights to freely associate, as guaranteed by the First Amendment to the United States Constitution. Kirchgessner Complaint, ¶¶ 41-42. Count two alleges the prohibition on FOP membership is a deprivation of a property right without due process, as guaranteed by the Fourteenth Amendment to the United States Constitution. ¶¶ 43-44. Count three alleges the Chief Justice and the Associate Justices acted under color of state law to deprive the Kirchgessner Plaintiffs rights guaranteed under the Constitution in violation of section 1983 of title 42 of the United States Code. *Id.*, ¶¶ 45-46. Count four alleges a violation of the Norris-LaGuardia Act, 29 U.S.C. § 101 *et. seq.*, by denying the Kirchgessner Plaintiffs their rights to freedom of association, self-organization and designation

of representatives of their own choosing. *Id.*, ¶ 47. Count five alleges a deprivation of rights, as provided by the New Jersey State Constitution, Art. 1, ¶ 19, because the prohibition on joining the FOP is a deprivation of the Kirchgessner Plaintiffs' rights to organize through representatives of their own choosing as public employees. *Id.*, ¶¶ 48-49. Count six alleges that forbidding membership in the FOP deprived the Kirchgessner Plaintiffs of their rights to join and assist any employee organization, as provided by N.J.S.A. § 34:13A-5.3.

The PANJ Complaint consists of four counts and parallels the first, third, fifth and sixth counts of the Kirchgessner Complaint except that it focuses on the ban concerning affiliation with the State PBA. The PANJ Complaint alleges violations of the First and Fourteenth Amendments to the United States Constitution in count one. PANJ Complaint, ¶¶ 46-47. Count two alleges a violation of section 1983 of title 42 of the United States Code. *Id.*, ¶¶ 48-49. Count three alleges a deprivation of rights, as provided by the New Jersey State Constitution, Art. 1, ¶ 19. *Id.*, ¶¶ 50-52. Count four alleges a violation of N.J.S.A. § 34:13A-1 *et seq. Id.*, ¶¶ 52-53.

Discussion

A. Standard For Dismissal Under Rule 12(b)(6)

Because granting a motion under Rule 12(b)(6) can result in a dismissal at an early stage of a plaintiff's case, all allegations of a plaintiff must be taken as true and all reasonable factual inferences drawn in his or her favor. *Gomez v. Toledo*, 446 U.S. 635, 636 (1980); *Piecknick v. Pennsylvania*, 36 F.3d 1250, 1255 (3d Cir. 1994); *Jordan v.*

Fox, Rothchild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994); *Schrob v. Catterson*, 948 F.2d 1402, 1405 (3d Cir. 1991); *Unger v. National Residents Matching Program*, 928 F.2d 1392, 1395 (3d Cir. 1991); *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990); *Melikian v. Corradetti*, 791 F.2d 274, 277 (3d Cir. 1986). Nevertheless, legal conclusions made in the guise of factual allegations are not given a presumption of truthfulness. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Haase v. Webster*, 807 F.2d 208, 215 (D.C.Cir. 1986); *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981), *aff'd*, 460 U.S. 325 (1983); *Western Mining Council v. Watt*, 643 F.2d 618, 626 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981); *Bermingham v. Sony Corp. of Am.*, 820 F.Supp. 834, 846 (D.N.J. 1992), *aff'd*, 37 F.3d 1485 (3d Cir. 1994).

A court may dismiss a complaint for failure to state a claim where it appears beyond doubt that no relief could be granted under any set of facts which could be proved consistent with the allegations. *Hartford Fire Ins. Co. v. Merrett Underwriting Agency Management Ltd.*, ___ U.S. ___, 113 S.Ct. 2891, 2917 (1993); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Piecknick*, 36 F.3d at 1255; *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir. 1994); *Jordan*, 20 F.3d at 1261; *Unger*, 928 F.2d at 1395; *Markowitz*, 906 F.2d at 103; *Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988); *Angelastro v. Prudential-Bache Secur., Inc.*, 764 F.2d 939, 944 (3d Cir. 1985), *cert. denied*, 474 U.S. 935 (1985).

A Federal court reviewing the sufficiency of a complaint has a limited role. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support his [, her or its] claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Estate*

of Bailey v. County of York, 768 F.2d 503, 506 (3d Cir. 1985); *Bermingham*, 820 F.Supp. at 846.

Applying these principles to the instant action, the inquiry is whether the allegations made by the Plaintiffs in the Kirchgessner Complaint and the PANJ Complaint are sufficient, so as to entitle them to offer evidence in support of such allegations.

B. Standard of Review for First Amendment Restrictions Placed on Public Employees

"Even though [the Plaintiffs] work for the Government, they have not relinquished 'the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest.' " *United States v. National Treasury Employees Union*, ___ U.S. ___, 115 S.Ct. 1003, 1012 (1995) (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)). Nonetheless, as the *National Treasury* Court explained: "In *Pickering* and a number of other cases we have recognized that Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." *Id.* at 1012. When making a determination concerning the validity of restraints placed on public employees, a court "must 'arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [s]tate, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Id.* at 1012 (quoting *Pickering*, 391 U.S. at 568); *see also Waters v. Churchill*, ___ U.S. ___, 114 S.Ct. 1878, 1884 (1994) (plurality opinion) ("[t]o be protected, the speech must be on

a matter of public concern, and the employee's interest in expressing [himself or] herself on the subject must not be outweighed by any injury the speech could cause" to the Governmental interest of promoting efficiency of its public services (citing *Connick v. Myers,* 461 U.S. 138, 142 (1983))); *Swineford v. Snyder County Pa.,* 15 F.3d 1258, 1272 (3d Cir. 1994) (citing *Pickering* and *Connick* and explaining its inquiry as "whether the [government's] interests in proper departmental management outweighed [plaintiff's] interest in commenting on matters of public concern").

As the Supreme Court explained in *Waters*:

> The key to First Amendment analysis of government employment decisions, then is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Waters, 114 S.Ct. at 1888.

In *National Treasury,* the Court explained that it "applied Pickering's balancing test only when the employee spoke 'as a citizen upon matters of public concern' rather than *'as an employee* upon matters only of personal interest.' " *National Treasury,* 115 S.Ct. at 1013 (quoting *Connick,* 461 U.S. at 147). According to the Court, an employee's private speech can give rise to

discipline while imposing no special burden of justification on the government employer. *Id.*

With regard to speech involving a matter of public concern, the government has a burden to justify its adverse employment action. *Id.* Nonetheless, the Court "has consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." *Waters*, 114 S.Ct. at 1887; *see also Connick*, 461 U.S. at 151 (" 'the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs' " (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974))).

Whether a public employee's speech addresses a matter of public concern is determined by the content, form and context of such statement. *Connick*, 461 U.S. at 148. "The inquiry into the protected status of speech is one of law, not fact." *Id.* at n.7.

In *National Treasury* the Supreme Court explained that cases where it has "applied *Pickering*'s balancing test" have generally involved disciplinary actions taken by a government employer in response to an employee's speech. 115 S.Ct. at 1012-13. In the instant action, the Plaintiffs argue that because "[h]ere the issue is not one of freedom of speech, but rather one of freedom of association . . . the more stringent standard of strict scrutiny must be applied." PANJ Reply Brief at 9 (arguing the New Jersey Supreme Court policy " 'cannot be justified upon a mere showing of legitimate State interest' . . . [rather it] must be 'paramount, one of vital

importance, and the burden is on the government to show the existence of such an interest.' " (quoting *Elrod v. Burns*, 427 U.S. 347, 362 (1976)); *see also* Kirchgessner Reply Brief at 1-2 ("the freedom to associate (along with the freedom of speech) is at issue . . . the United States Supreme Court has, in fact, applied the more stringent standard of strict scrutiny where the freedom of association is at issue[;] . . . Plaintiffs submit that under *Elrod v. Burns*, the strict scrutiny test must be applied").

Notwithstanding the Plaintiffs' assertions, reliance on *Elrod* is misplaced. *Elrod* involved the discharge or threat of discharge of public employees because of their partisan political affiliation or non-affiliation. *Elrod*, 427 U.S. at 349. According to the Court, *Elrod* and *Branti v. Finkel*, 445 U.S. 507 (1980), "decided that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless the party affiliation is an appropriate requirement for the position involved." *Rutan v. Republican Party*, 497 U.S. 62, 64 (1990). The instant action, therefore, is distinguishable from *Elrod* and its progeny. Accordingly, such line of precedent does not require the application of the "strict scrutiny" test to the case at bar.[5]

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[5] To further support their argument for the application of the "strict scrutiny" test, the Plaintiffs rely upon *Labov v. Lalley*, 809 F.2d 220, 222-23 (3d Cir. 1987), *Mescall v. Rochford*, 655 F.2d 111 (7th Cir. 1981), *Vorbeck v. McNeal*, 407 F.Supp. 733 (E.D.Mo. 1976), *Police Officers Guild, Nat'l Union of Police Officers v. Washington*, 396 F.Supp. 543 (D.D.C. 1973) and *Atkins v. City of Charlotte*, 296 F.Supp 1068 (W.D.C.C. 1969). Kirchgessner Brief at 8-10; Kirchgessner Reply Brief at 2; PANJ Brief at 7-13; PANJ

The *Pickering/Connick* balancing test developed from cases which, like the instant action, alleged violations of public employees' associational rights. The *Connick* Court explained:

> In all of these cases, the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs. The issue was whether government employees could be prevented or "chilled" by the fear of discharge from *joining political parties and other associations that certain public officials might find "subversive."*

Connick, 461 U.S. at 144-45 (emphasis added). The history of the *Pickering/Connick* balancing test, therefore, provides further support for its application in the instant case where associational rights are implicated.[6] Accordingly,

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Reply Brief at 9. These cases are distinguishable from the instant action and, therefore, provide no controlling, or persuasive, authority for the Plaintiffs' position.

As counsel for the Defendants point out, in none of these cases did the courts apply the *Pickering/Connick* balancing test, because such test was inapplicable. In each the courts reviewed restraints placed on the rights of employees to join unions and collectively bargain. Defendants Brief at 16. The Supreme Court of New Jersey "is merely prohibiting affiliation with police organizations, whether or not the organizations happens to be a union. The [8 July 1994 Opinion] merely affirmed a longstanding policy which in no way targeted unionization." *Id.* at 17.

[6] Additionally, associational rights derive from other First Amendment rights including freedom of speech. *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 622 (1984) ("[T]he Court has recognized a right to associate for the purpose of engaging

the *Pickering/Connick* balancing test, not "strict scrutiny" will be applied in the instant case.

C. Application of the Pickering/Connick Balancing Test to the Instant Action

The Plaintiffs argue even under the *Pickering/Connick* balancing test, the governmental interest of maintaining impartiality in appearance and in fact, which underlies the ban on probation membership in law enforcement organizations, does not outweigh the Plaintiffs' interest in affiliating with the State PBA or the FOP. Kirchgessner Reply Brief at 3; PANJ Reply Brief at 10. Plaintiffs argue the instant ban on probation membership in law enforcement organizations is analogous to the ban struck down in *National Treasury* because it is a broad based prophylactic rule. Kirchgessner Reply Brief at 6; PANJ Reply Brief at 12.

At issue in *National Treasury* was the constitutionality of a subsection of the Ethics in Government Act which prohibited Federal employees from accepting any compensation for delivering speeches or writing articles. *National Treasury,* 115 S.Ct. at 1008. The ban in *National Treasury* "applie[d] even when neither the subject of the speech or article nor the person or group paying for it ha[d] any connection with the employee's official duties." *Id.*

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in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion.").

According to the Court:

> The Government's underlying concern is that [F]ederal officers not misuse or appear to misuse power by accepting compensation for their unofficial and nonpolitical writing and speaking activities. This interest is undeniably powerful, but the Government cites no evidence of misconduct related to honoraria in the vast rank and file of [F]ederal employees. . . .

Id. at 1015-16. In striking the ban, the Court explained that absent a nexus limitation between speech and an employees official duties, "[a] blanket burden on the speech of 1.7 million [F]ederal employees requires a much stronger justification than the Government's dubious claim of administrative convenience." *Id.* at 1017.

Plaintiffs argue the Chief Justice and the Associate Justices cannot, as the Court required in *National Treasury*, " ' "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate harms in a direct and material way." ' " PANJ Reply Brief at 12 (quoting *National Treasury*, 115 S.Ct. at 1017 (quoting *Turner Broadcasting System*, ___ U.S. ___, 114 S.Ct. 2445, 2450 (1994))). Plaintiffs argue, despite the opportunity to present evidence to the Special Master over the five days of hearings on this matter, the Chief Justice and the Associate Justices "could not point to any specific evidence . . . to support [the] claim that the 'risk' to impartiality grants them carte blanche to infringe upon First Amendment rights." PANJ Reply Brief at 11. Further, the Plaintiffs argue the Special Master "concluded that there cannot be a generalized prohibition against

probation officers becoming members of or being affiliated with law enforcement organizations." *Id.*

The ban on law enforcement membership by probation officers is distinguishable from the ban in *National Treasury*. As discussed, the ban in *National Treasury* prohibited speech even when it had no relationship to a Federal employee's official duties. *National Treasury*, 115 S.Ct. at 1008. As counsel for the Defendants point out:

> [I]n this case the New Jersey Supreme Court's ban on probation officer membership in police organizations is directly related to probation officers' employment. That is, as employees of the Judiciary, they must maintain their impartiality, in appearance and in fact. Their membership in an organization which is aligned with one side in the adversary process is inconsistent with the requirement of such impartiality.

Defendants Addendum at 3.[7]

In the instant action, the issue is not merely whether any individual probation officer will in fact lose his or her ability to be impartial as a result of law enforcement association membership. Instead, the harm which has been articulated is the appearance of partiality from permitting probation officers, who are part of the judiciary,

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[7] The reason articulated by the Plaintiffs for their desire to affiliate with law enforcement associations verifies the concerns of the Chief Justice and the Associate Justices. "Affiliation with the State PBA will foster more professional and collaborative working relationships between probation officers, parole and police officers, which is vital to a strong and efficient criminal justice system." PANJ Brief at 2.

to join the ranks of law enforcement.[8] As argued at the 17 April Hearing, the governmental interest underlying the 8 July 1994 Opinion is the avoidance of partiality and conflict both in fact and appearance. See 17 April Hearing Tr. at 5-6.[9]

Maintaining, the appearance of impartiality of the judiciary is an interest of vital importance.[10] *United States*

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[8] As counsel for the Defendants explained:

> Historically, the primary function of probation has been the enforcement of court orders, including the conditions of probation. This function includes, in appropriate circumstances, the presentation of probation violation reports to judges. This central function includes both punitive and rehabilitative components which must be balanced by the probation officer. More recently, other critical functions have been added to the responsibilities of probation officers such as case management functions including investigating for and preparing pre-sentence reports, bail reports and pretrial intervention reports, all of which are used by judges in making judicial decisions.

Defendants Brief at 5-6 (citations omitted).

With regard to the function of probation officers, the Plaintiffs state: "[T]he issue here is probation officers' constitutional First Amendment right to become members of or affiliate with law enforcement organizations of their choice. Whether the probation function is primarily rehabilitative or punitive is irrelevant to this constitutional analysis." PANJ Reply Brief at 5.

[9] At the 17 April Hearing the Plaintiffs conceded that there was nothing "more important than the need for the judiciary to not only be impartial but to appear impartial." 17 April Hearing Tr. at 7.

[10] As noted, the Plaintiffs do not contest this. *See supra* note 9.

Civil Serv. Comm'n v. National Assoc. of Letter Carriers, 413 U.S. 548, 564 (1973). In *United States Civil Serv. Comm'n*, the Court applied *Pickering* to uphold the constitutionality of the Hatch Act, 5 U.S.C. § 7324(a)(2), which prohibited Federal employees from taking an active role in partisan political activities. 413 U.S. at 564.

The Court explained that "[n]either the right to associate nor the right to participate in political activities is absolute in any event." *Id.* at 567. The employees of the Executive Branch

> are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof. A major thesis of the Hatch Act is that to serve this great end of Government – the impartial execution of laws – it is essential that [F]ederal employees, for example, not take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns, and not run for office on partisan political tickets. . . .
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> There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but *it is also crucial that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.*

Id. at 565 (emphasis added).

As was explained at the 17 April Hearing, and conceded by the Plaintiffs, when weighing the competing interests between a public employer's need to have wide discretion in running an efficient operation and the

speech and associational rights of its employees, the judiciary has greater concerns of maintaining its impartiality both in appearance and in fact than other branches of government. 17 April Hearing Tr. at 12-14. As explained at the 17 April Hearing:

> [T]he judiciary and each of the employees of the judiciary, not only has to be impartial, not only has to avoid conflict in fact, but has to make sure [to] avoid the appearance of . . . any partiality or any conflict. It seems that because of the separation of powers, the judiciary has to be self-policing in many respects.

Id. at 14.

Despite the Plaintiffs' argument to the contrary, it does not appear that the New Jersey Supreme Court's ban on law enforcement membership was, or is, at odds with the findings of the Special Master.[11] As indicated, the New Jersey Supreme Court explained that, it did not adopt all of the findings of the Special Master. 8 July Opinion at 3. Nonetheless, as the New Jersey Supreme Court pointed out, the Special Master found "the evidence was 'not such that a true factual determination [could] be made.' " *Id.* (quoting the Report of the Special Master at 3).

Further, while the Chief Justice and the Associate Justices did not point to specific evidence of impartiality

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[11] It is unclear why the adherence, or lack thereof, to the Report of the Special Master is of significance to the instant analysis. In any event, this issue is addressed because the Plaintiffs have raised it numerous times in their briefs and at the 17 April Hearing.

by probation officers, the Special Master repeatedly indicated that there was "no evidence one way or the other" and that he was unable to make any generalized determinations. Report of the Special Master at 5-7. At the 17 April Hearing the Plaintiffs again pointed to a lack of "empirical" or "objective" evidence to support the 8 July 1994 Opinion. 17 April Hearing Tr. at 15-18 ("although [the Plaintiffs] wouldn't say the [New Jersey] Supreme Court took its views out of thin air, [we] can say there is just no basis for it, except theory"). As also explained at the 17 April Hearing:

> [T]he only way you could have empirical data is when partiality is developed, when conflict is developed and at that point it is too late, the system is brought down under its own weight . . . there can[not] be any basis, other than for theory unless the system went so awry, unless the system was so rife with corruption or partiality that it [the evidence] would [then] be[come] objective. . . .
>
> What makes the judiciary viable in any governmental setting is th[e] distance that impartiality and the appearance of impartiality . . . [create and which] people can rely upon. . . .

Id. at 15-18. *Cf. Waters,* 114 S.Ct. at 1887 ("Few of the examples we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative.").

The Chief Justice and the Associate Justices made a reasonable determination that membership by probation officers in the State PBA and the FOP will impair the impartiality of the judiciary in fact and appearance. It

appears this harm is "real" and "not merely conjectural." *National Treasury*, 115 S.Ct. at 1017. Further, the interest in maintaining the appearance of impartiality of the judiciary outweighs the desire of thePlaintiffs to affiliate with law enforcement organizations.[12]

Dismissal, pursuant to Rule 12(b)(6), of the Plaintiffs' claims under the First Amendment is appropriate. As argued by counsel for the Defendants, in light of the "paramount interest in maintaining an independent and impartial [j]udiciary, the prohibition of probation officer membership in police organizations is of the type that a public employer may reasonably place on its employees. . . . " Defendants Brief at 9. *See National Treasury*, 115 S.Ct. at 1012; *Waters*, 114 S.Ct. at 1888; *Connick*, 461 U.S. at 142; *Pickering*, 391 U.S. at 568;

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[12] As previously quoted:

> Given the nature and functions of probation, it must be as impartial as the rest of the judiciary, totally so and scrupulously so. Probation cannot take sides any more than a court may, and cannot be perceived as taking sides any more than a court may. . . . It has no more right to become allied with a public defender's office than with prosecutors or police. Probation represents no special interest in society and government but one: the courts.
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> Police and police organizations have but one interest and one role: law enforcement. Everything they do serves that interest: investigating crime, apprehending criminals, aiding in the prosecution and conviction of the accused, and in the imposition of punishment. The police stand firmly and properly on one side of the scales of criminal justice – the prosecution's side.

8 July 1994 Opinion at 4.

Swineford, 15 F.3d at 1272. Moreover, it appears beyond doubt that no relief could be granted under any set of facts which could be proved consistent with the allegations of First Amendment violations, as set forth in the Kirchgessner Complaint and the PANJ Complaint. *Hartford Fire*, 113 S.Ct. at 2917; *Hishon*, 467 U.S. at 73; *Conley*, 355 U.S. at 45-46; *Piecknick*, 36 F.3d at 1255; *ALA*, 29 F.3d at 859; *Jordan*, 20 F.3d at 1261; *Unger*, 928 F.2d at 1395; *Markowitz*, 906 F.2d at 103; *Ransom*, 848 F.2d at 401; *Angelastro*, 764 F.2d at 944. Accordingly, the motion to dismiss the Plaintiffs' claims under the First Amendment, as alleged in counts one of the Kirchgessner Complaint and the PANJ Complaint, is granted pursuant to Rule 12(b)(6).

D. Other Federal Claims

As indicated, in addition to their First Amendment claims, Plaintiffs also allege the New Jersey Supreme Court policy violates their due process rights under the Fourteenth Amendment, the Norris-LaGuardia Act, and section 1983 of title 42 of the United States Code (collectively, the "Federal Claims").

1. Due Process

Plaintiffs allege in count two of the Kirchgessner Complaint and in count one of the PANG [sic] Complaint the Chief Justice and the Associate Justices, by their ban on affiliation with law enforcement organizations, have deprived the Plaintiffs of a property right without due process as guaranteed by the Fourteenth Amendment to

the United States Constitution. Kirchgessner Complaint, ¶¶ 43-44; PANJ Complaint, ¶¶ 46-47.

The determination of whether a plaintiff has adequately alleged a violation of the Fourteenth Amendment's Due Process Clause involves two steps. First, it must be determined whether Plaintiffs have alleged interference with a protected liberty interest. *See Meachum v. Fano*, 427 U.S. 215, 223 (1976); *Stephany v. Wagner*, 835 F.2d 497, 499 (3d Cir. 1987), *cert. denied*, 487 U.S. 1207 (1988); *Mims v. Shapp*, 744 F.2d 946, 949 (3d Cir. 1984). Second, it must be determined whether the procedures employed by the state to protect that liberty interest were constitutionally inadequate. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Mims*, 744 F.2d at 949.

With respect to the first of these steps, the Supreme Court has stated: "Liberty interests protected by the Fourteenth Amendment may arise from two sources – the Due Process Clause itself and the laws of the states." *Hewitt v. Helms*, 459 U.S. 460, 466 (1983); *see Board of Pardons v. Allen*, 482 U.S. 369, 373 (1987); *Stephany*, 835 F.2d at 499.

The Plaintiffs have not alleged a protected liberty interest nor that such interest was deprived without due process of law. The Plaintiffs argue if they do not follow the policy of the New Jersey Supreme Court, "they are threatened with termination from their jobs. . . . Such termination clearly threatens the [P]laintiffs' property interests." Kirchgessner Brief at 11. As counsel for the Defendants pointed out: "[P]laintiffs do not allege . . . that if any probation officers are terminated for a violation of the policy that they would not be given a

hearing on that action. It is the termination of employment which must be attended by due process, not the announcement of the policy." Defendants Brief at 32-33.

It appears, therefore, beyond doubt that no relief could be granted under any set of facts which could be proved consistent with the allegations of due process violations, as set forth in the Kirchgessner Complaint and the PANJ Complaint.[13] *Hartford Fire*, 113 S.Ct. at 2917; *Hishon*, 467 U.S. at 73; *Conley*, 355 U.S. at 45-46; *Piecknick*,

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[13] Plaintiffs also contend their due process rights were violated by the New Jersey Supreme Court "by deciding this case since the circumstance impose a risk of bias or prejudice on the part of the [New Jersey] Supreme Court (which acted as both participant-respondent and the purported arbiter)." Kirchgessner Brief at 12. Plaintiffs argue: " '[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.' " Kirchgessner Brief at 12 (quoting *Schweiker v. Mclure*, 456 U.S. 188, 195 (1982)). As mentioned, however, the 8 July 1994 Opinion was issued by the New Jersey Supreme Court in its "quasi-legislative" capacity. 8 July 1994 Opinion at 2.

Plaintiffs, do not appear to contest that the 8 July 1994 Opinion was "quasi-legislative." Instead, according to Plaintiffs: "to argue that due process (which is, in essence, fairness) is inapplicable to the [New Jersey] State Supreme Court is improper and misguided." Kirchgessner Reply Brief at 11. Plaintiffs have provided no authority, however, for their argument that it was a due process violation for the New Jersey Supreme Court to set the policy for the employees of the judiciary. As discussed, conclusory assertions, such as those advanced here by the Plaintiffs, are not afforded any presumption of truthfulness sufficient to survive a Rule 12(b) (6) motion. *See Papasan*, 478 U.S. at 286; *Haase*, 807 F.2d at 215; *Briscoe*, 663 F.2d at 723; *Western Mining Council*, 643 F.2d at 626; *Bermingham*, 820 F.Supp. at 846.

36 F.3d at 1255; *ALA*, 29 F.3d at 859; *Jordan*, 20 F.3d at 1261; *Unger*, 928 F.2d at 1395; *Markowitz*, 906 F.2d at 103; *Ransom*, 848 F.2d at 401; *Angelastro*, 764 F.2d at 944. Accordingly, the motion to dismiss the Plaintiffs' claims under the Fourteenth Amendment, as alleged in count two of the Kirchgessner Complaint and count one of the PANJ Complaint, is granted pursuant to Rule 12(b) (6).

2. Norris-LaGuardia Act

Count four of the Kirchgessner Complaint alleges a violation of the Norris-LaGuardia Act, 29 U.S.C. § 101 *et. sec.*, by denying the Kirchgessner Plaintiffs their rights to freedom of association, self-organization and designation of representatives of their own choosing. Kirchgessner Complaint, ¶ 47. The Norris-LaGuardia Act provides:

> No court of the United States shall have jurisdiction to issue any restraining order or . . . injunction . . . to prohibit any person or persons participating . . . whether singly or in concert . . . from . . . [among other things] refusing to perform any work [and] . . . [a]ssembling peaceably to . . . organize . . . in promotion of their interests in a labor dispute.

Norris-LaGuardia Act, 29 U.S.C. § 104.

As counsel for the Defendants argues: "Plaintiffs offer no explanation as to how [the New Jersey] Supreme Court's policy, which is not issued in its judicial capacity, could possibly violate the Norris-LaGuardia Act." Defendants Brief at 32. According to the Plaintiffs, "assuming *arguendo* that the [D]efendants are correct, . . . it is the

policy considerations of the Norris-LaGuardia Act which are significant." Kirchgessner Reply Brief at 9.

It appears the Plaintiffs are arguing that even though the instant action neither implicates their right to representation by a union nor their right to collectively bargain, a right for them to join a law enforcement organization should be recognized as within the "policy" of the Norris-LaGuardia Act. The Plaintiffs are unable to point to any authority to support such assertion.

It appears beyond doubt that no relief could be granted under any set of facts which could be proved consistent with the allegations of a violation of the Norris-LaGuardia Act as set forth in the Kirchgessner Complaint. *Hartford Fire*, 113 S.Ct. at 2917; *Hishon*, 467 U.S. at 73; *Conley*, 355 U.S. at 45-46; *Piecknick*, 36 F.3d at 1255; *ALA*, 29 F.3d at 859; *Jordan*, 20 F.3d at 1261; *Unger*, 928 F.2d at 1395; *Markowitz*, 906 F.2d at 103; *Ransom*, 848 F.2d at 401; *Angelastro*, 764 F.2d at 944. Therefore, the motion to dismiss the Plaintiffs' claim under the Norris-LaGuardia Act, as alleged in count four of the Kirchgessner Complaint, is granted pursuant to Rule 12(b) (6).

3. 42 U.S.C. § 1983

Count three of the Kirchgessner Complaint and count two of the PANG [sic] Complaint allege the Chief Justice and the Associate Justices acted under color of state law to deprive the Plaintiffs their rights guaranteed under the Constitution in violation of section 1983 of title 42 of the United States Code. Kirchgessner Complaint, ¶¶ 45-46;

PANG [sic] Complaint, ¶¶ 48-49. Section 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

"In order to prevail in a [section] 1983 action, a plaintiff must establish (1) that 'the conduct complained of was committed by a person acting under color of state law' and (2) that the 'conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.' " *Shaw v. Strackhouse*, 920 F.2d 1135, 1141-42 (3d Cir. 1990) (quoting *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986)).

In light of the foregoing discussion, the Plaintiffs are unable to establish the second requirement for the maintenance of a claim under section 1983. It appears, therefore, beyond doubt that no relief could be granted under any set of facts which could be proved consistent with the allegations of section 1983 violations as set forth in the Kirchgessner Complaint and the PANJ Complaint. *Hartford Fire*, 113 S.Ct. at 2917; *Hishon*, 467 U.S. at 73; *Conley*, 355 U.S. at 45-46; *Piecknick*, 36 F.3d at 1255; *ALA*, 29 F.3d at 859; *Jordan*, 20 F.3d at 1261; *Unger*, 928 F.2d at 1395;

Markowitz, 906 F.2d at 103; *Ransom*, 848 F.2d at 401; *Angelastro*, 764 F.2d at 944. Accordingly, the motion to dismiss the Plaintiffs' claims under section 1983 of title 42, as alleged in count three of the Kirchgessner Complaint and count two of the PANJ Complaint, is granted pursuant to Rule 12(b) (6).

E. State Law Claims

As discussed, in addition to the Federal Claims, the Plaintiffs allege the Chief Justice and the Associate Justices have violated their rights under New Jersey state law (the "State Law Claims").

Count five of the Kirchgessner Complaint and count three of the PANJ Complaint allege a deprivation of rights as provided by the New Jersey State Constitution, Art. 1, ¶ 19. Plaintiffs allege that the prohibition on affiliation with the State PBA and the FOP is a deprivation of the Plaintiffs' right to organize through representatives of their own choosing as public employees. Kirchgessner Complaint, ¶¶ 48-49; PANJ Complaint, ¶¶ 50-52. Additionally, count six of the Kirchgessner Complaint and count four of the PANJ Complaint allege forbidding membership in the State PBA and the FOP deprived the Plaintiffs of the right to join and assist any employee organization, as guaranteed by N.J.S.A. § 34:13A-5.3. Kirchgessner Complaint, ¶¶ 50-52; PANJ Complaint, ¶¶ 52-53.

Supplemental jurisdiction enables Federal courts to hear state law claims over which there is no independent basis of jurisdiction. 28 U.S.C. § 1367; *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349 (1988); *United Mine*

Workers v. Gibbs, 383 U.S. 715, 725 (1966); *Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*, 24 F.3d 1368, 1374 (3d Cir. 1994). Supplemental jurisdiction depends upon the existence of subject matter jurisdiction over other Federal claims in the action. Section 1367(c) permits a court to decline supplemental jurisdiction when "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c) (3); *see also, Carnegie-Mellon*, 484 U.S. at 350 (when the Federal-law claims have dropped out of the lawsuit and only state-law claims remain, the Federal court should decline the exercise of jurisdiction by dismissing the case without prejudice).

In the instant case, the Plaintiffs base Federal jurisdiction upon 42 U.S.C. § 1983, 28 U.S.C. § 1343 and 29 U.S.C. § 102. Kirchgessner Complaint, ¶¶ 2-3; PANJ Complaint, ¶ 4. Because dismissal pursuant to Rule 12(b)(6) is granted as to the Federal Claims, such claims can no longer support supplemental jurisdiction in this court. 28 U.S.C. § 1367(a),(c).

In the instant action, there appears to be no independent basis for jurisdiction over the State Law Claims. It appears the Plaintiffs reside in New Jersey. Kirchgessner Complaint, ¶ 6; PANJ Complaint, ¶¶ 9-14. The Chief Justice and the Associate Justices are sued in their official capacity, and are all alleged to maintain chambers in the state of New Jersey. Kirchgessner Complaint, ¶¶ 7-13; PANJ Complaint, ¶¶ 15-21. In fact, it appears all are residents of New Jersey. Plaintiffs do not allege diversity jurisdiction; it appears they have no basis for such an allegation. Because no other ground for supplemental jurisdiction is alleged, nor does any appear appropriate, supplemental jurisdiction will not be exercised in the

instant case. *Carnegie-Mellon*, 484 U.S. at 350 n.7 (citing *Gibbs*, 383 U.S. at 725); *Angst v. Mack Trucks, Inc.*, 969 F.2d 1530, 1535 (3d Cir. 1992); *Fuentes v. South Hills Cardiology*, 946 F.2d 196, 198 n.3 (3d Cir. 1991); 28 U.S.C. § 1367(c) (3). Accordingly, the State Law Claims alleged in counts five and six of the Kirchgessner Complaint and in counts three and four of the PANJ Complaint are dismissed without prejudice.

F. Preliminary Injunction

The Circuit has established, that the decision to issue a preliminary injunction is based upon a review of four factors:

> (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

Gerardi v. Pelullo, 16 F.3d 1363, 1373 (3d Cir. 1994); *see also S & R Corp. v. Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 374 (3d Cir. 1992); *Merchant & Evans, Inc. v. Roosevelt Bldg. Prods. Co.*, 963 F.2d 628, 632 (3d Cir. 1992); *Opticians Ass'n of Am. v. Independent Opticians of Am.*, 920 F.2d 187, 191-92 (3d Cir. 1990); *Alessi v. Pennsylvania Dept. of Pub. Welfare*, 893 F.2d 1444, 1447 (3d Cir. 1990); *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 799 (3d Cir. 1989); *Fechter v. HMW Indus., Inc.*, 879 F.2d 1111, 1116 (3d Cir. 1989); *Apollo Technologies v. Centrosphere Indus.*, 805 F.Supp. 1157, 1191 (D.N.J. 1992); *Glenside West Corp. v. Exxon Co.*,

U.S.A., 761 F.Supp. 1118, 1132 (D.N.J. 1991); *CPC Int'l, Inc. v. Caribe Food Distribs.*, 731 F.Supp. 660, 664 (D.N.J. 1990); *Bascom Food Prods. Corp. v. Reese Finer Foods, Inc.*, 715 F.Supp. 616, 624 (D.N.J. 1989).

Of these four requirements, the Circuit has placed particular weight on the probability of irreparable harm and the likelihood of success on the merits, stating: " '[W]e cannot sustain a preliminary injunction ordered by the district court where either or both of these prerequisites are absent.' " *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 197 (3d Cir. 1990) (quoting *In re Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137, 1143 (3d Cir. 1982)); *see also Instant Air*, 882 F.2d at 800; *Morton v. Beyer*, 822 F.2d 364, 367 (3d Cir. 1987); *Freixenet, S.A. v. Admiral Wine & Liquor Co.*, 731 F.2d 148, 151 (3d Cir. 1984).

Significantly, the Circuit has repeatedly stated that a "grant of injunctive relief is an extraordinary remedy which should be granted only in limited circumstances." *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988); *accord Chez Sez III Corp. v. Union*, 945 F.2d 628, 634 (3d Cir. 1991), *cert. denied*, 503 U.S. 907 (1992); *Instant Air*, 882 F.2d at 800; *United States v. Philadelphia*, 644 F.2d 187, 191 n.1 (3d Cir. 1980); *see also Driscoll Potatoes, Inc. v. N.A. Produce Co.*, 765 F.Supp. 174, 176 (D.N.J. 1991).

In light of the dismissal of all counts of the Kirchgessner Complaint and all counts of the PANJ Complaint, the motion by Plaintiffs for a preliminary injunction is denied as moot.

G. Class Certification for the Kirchgessner Plaintiffs

Rule 23(c)(1) of the Federal Rules of Civil Procedure ("Rule 23") provides: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Fed.R.Civ.P. 23(c) (1). As the Fifth Circuit in *Floyd v. Bowen*, 833 F.2d 529, 534 (5th Cir. 1987) explained:

> The timing requirements of Rule 23 are not absolute. Professor Wright explains that "[t]he court always is empowered to make a determination on the merits irrespective of the denomination of the suit as a class action . . . the propriety of that inquiry is limited only by concerns of whether the class determination should be postponed until after the merits determination." C. Wright, A. Miller, and M. Cane, 7 Federal Practice & Procedure, 1785 at 128 (footnote omitted) (1986). Indeed . . . the class action litigation may be halted by a . . . motion to dismiss or by a . . . motion for summary judgment.

Id. (citations omitted); *see also Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984)("It has never been doubted that a complaint asserting a class action could be dismissed on the merits before determining whether the suit could be maintained as a class action."), *cert. denied*, 471 U.S. 1125 (1985); *Wright v. Schock*, 742 F.2d 541, 543-44 (9th Cir. 1984)(holding that district court has discretion, under appropriate circumstances, to rule on summary judgment motion before addressing pending class certification motion).

In *Finberg v. Sullivan*, 634 F.2d 50, 64 (3d Cir. 1980), the Third Circuit held, however, that the determination of the merits of a plaintiff's claims was not a valid basis to deny a motion for class certification. The Circuit explained: "In general, the certification of a class does not depend upon whether the substantive claims have any merit." *Id.* (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974); *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970)).

In *Finberg*, the plaintiff had filed a timely motion for class certification, upon which the district court took no action for nine months prior to defendants' motion for summary judgment. 634 F.2d at 64. The district court finally found the plaintiff's claims lacked merit and, therefore, reasoned that there was no purpose for class certification. *Id.* Under these circumstances, and where there was a risk that the claim of the named plaintiff would become moot, the Third Circuit held "the district court's rulings on the plaintiff's substantive claims did not constitute a valid basis for denial of class certification." *Id.*

The instant action is distinguishable from *Finberg*. The Kirchgessner Complaint includes a demand for class certification, Kirchgessner Complaint, ¶¶ 23-28 and at 12; however, there is no pending motion for class certification. Moreover, neither party has briefed the propriety of such class certification.

As the court in *Marx* explained, the Supreme Court's decision in *Eisen*

> stand[s] for the proposition that when a district court is determining whether a class action may

> properly be maintained under [Rule 23], the relative merits of the underlying dispute are to have no impact upon the determination of the propriety of the class action. [*Eisen*] . . . do[es] not establish a broad rule that in all cases the determination of the propriety of a class action must precede any consideration of the merits.

747 F.2d at 1552.

Under the circumstances of the instant action, where class certification was neither raised by the parties in a prior motion nor briefed in the instant motion for preliminary injunction or in the cross-motion for dismissal, it is appropriate to determine the merit of the cross-motion for dismissal without determining the class certification demand. In light of the propriety of the cross-motion by the Chief Justice and the Associate Justices for dismissal pursuant to Rule 12(b)(6) and the dismissal of all counts of the Kirchgessner Complaint and the PANJ Complaint, it appears unnecessary to address the class certification issue. *See Marx*, 747 F.2d at 1552 ("To require notice to be sent to all potential plaintiffs in a class action when the underlying claim is without merit is to promote inefficiency for its own sake."). Accordingly, the Kirchgessner Plaintiffs demand for class certification is denied as moot.

Conclusion

For the reasons set forth above, the cross-motion by the Chief Justice and the Associate Justices to dismiss the Federal Claims, alleged in counts one through four of the Kirchgessner Complaint and counts one and two of the PANJ Complaint is granted; supplemental jurisdiction will not be exercised as to the State Law Claims, alleged

in counts five and six of the Kirchgessner Complaint and in counts three and four of the PANJ Complaint. The motion by Plaintiffs for a preliminary injunction is denied as moot; the Kirchgessner Plaintiffs demand for class certification is denied as moot. An order accompanies this opinion.

/s/ Alfred J. Lechner, Jr.
ALFRED J. LECHNER, JR.,
U.S.D.J.

AJL:jss
cc: John G. Basilone, Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Robert Kirchgessner, Jr., et al., Plaintiffs, v. Robert N. Wilentz, et al. Defendants.	CIVIL ACTION NO. 94-5973 (AJL) ORDER

This matter having come before the court by way of the motion of the plaintiffs (the "Plaintiffs") for a preliminary injunction (the "Preliminary Injunction Motion") and by the cross-motion of defendants (the "Defendants") for dismissal pursuant Rule 12(b)(6) of the Federal Rules of Civil Procedure (the "Motion to Dismiss"), and the court having considered the submissions of the parties, and for the reasons set forth in a Letter-Opinion filed on this date, and for good cause shown,

IT IS, on this 28th day of April, 1995,

ORDERED, that the Motion to Dismiss made by the Defendants is granted as to the Plaintiffs' causes of action based upon Federal law; and it is further

ORDERED, that supplemental jurisdiction will not be exercised as to the Plaintiffs' causes of action based upon state law; and it is further

ORDERED, that the causes of action based upon Federal law alleged by the Plaintiffs be and hereby are dismissed with prejudice; and it is further

ORDERED, that the causes of action based upon state law alleged by the Plaintiffs be and hereby are dismissed without prejudice; and it is further

ORDERED, that the Preliminary Injunction Motion made by the Plaintiffs be and hereby is denied as moot; and it is further

ORDERED, that the Plaintiffs' demand for class certification be and hereby is denied as moot.

/s/ Alfred J. Lechner, Jr.
ALFRED J. LECHNER, JR.,
U.S.D.J.

APPENDIX C

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5328; No. 95-5329

ROBERT A. KIRCHGESSNER, JR.; MICHAEL KRANYAK; ANDY KAFEL; JACK TOMASELLI; CHARLES BENE; MAUREEN COOL; BILL SHEERAN; PROBATION OFFICERS/FOP MEMBERS ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; THE PROBATION ASSOCIATION OF NEW JERSEY

Appellants

v.

ROBERT N. WILENTZ; ROBERT L. CLIFFORD; ALAN B. HANDLER; STEWART G. POLLOCK; DANIEL J. O'HEARN; MARIE L. GARIBALDI; GARY S. STEIN, IN THEIR OFFICIAL CAPACITIES AS JUSTICES OF THE SUPREME COURT OF NEW JERSEY

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil Nos. 94-05973, 94-06375)
District Judge: Hon. Charles R. Weiner

SUR PETITION FOR REHEARING
(Filed 8/21/96)

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS AND MCKEE, Circuit Judges

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The petition for rehearing filed by the Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, an [sic] no judge who concurred in the decision having asked for rehearing and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Richard L. Nygaard
Circuit Judge

DATED: AUG 21 1996
JM/CC: AJF
RHS

APPENDIX D

MARCH 28, 1994

THE HONORABLE ROBERT N. WILENTZ
CHIEF JUSTICE, NEW JERSEY SUPREME COURT

THE HONORABLE ROBERT L. CLIFFORD,
THE HONORABLE ALAN B. HANDLER
THE HONORABLE STEWART G. POLLOCK
THE HONORABLE DANIEL J. O'HEARN,
THE HONORABLE MARIE L. GARIBALDI,
THE HONORABLE GARY S. STEIN,
ASSOCIATE JUSTICES, NEW JERSEY SUPREME COURT

RE: PROCEEDINGS CONCERNING PROBATION OFFICERS' MEMBERSHIP IN LAW ENFORCEMENT ORGANIZATIONS AND PROPOSED AFFILIATION OF PANJ WITH THE PBA

DEAR MR. CHIEF JUSTICE AND ASSOCIATE JUSTICES:

I ENCLOSE HEREWITH EIGHT (8) COPIES OF REPORT OF SPECIAL MASTER IN THE ABOVE MATTER. THERE IS ALSO ENCLOSED WITH THE PACKET THE EXHIBITS PRESENTED DURING THE HEARING AND BEARING MARKINGS AOC-1 TO AOC-26, PANJ-1 TO PANJ-35, FOB-1 TO FOP-5 AND CPO-1 & 2.

IF THERE IS ANYTHING ELSE THAT YOU REQUIRE IN CONNECTION WITH THIS MATTER, PLEASE ADVISE.

VERY TRULY YOURS,

/s/ Paul R. Huot
PAUL R. HUOT
SPECIAL MASTER

CC: DAVID I. FOX, ESQ.
PAUL I. KLEINBAUM, ESQ.
JUDE DEL PREORE, CPO
GEORGE TOSI, ESQ.
ROBERT STOLOFF, DAG

SUPREME COURT OF NEW JERSEY

REPORT OF SPECIAL MASTER

IN THE MATTER OF PROCEEDINGS CONCERNING PROBATION OFFICERS' MEMBERSHIP IN LAW ENFORCEMENT ORGANIZATIONS AND PROPOSED AFFILIATION OF PANJ WITH THE PBA

APPEARANCES:

ADMINISTRATIVE OFFICE OF THE COURTS BY ROBERT STOLOFF AND MICHAEL DILLER, DEPUTIES ATTORNEYS GENERAL

PROBATION ASSOCIATION OF NEW JERSEY BY DAVID FOX, ESQUIRE AND CRAIG GUMPEL, ESQUIRE

POLICE BENEVOLENT ASSOCIATION BY PAUL KLEINBAUM AND ROBERT FAGELLA

FRATERNAL ORDER OF POLICE BY GEORGE TOSI, ESQUIRE

CHIEF PROBATION OFFICERS ASSOCIATION, PRO SE, BY CHIEF JUDE DEL PREORE, PRESIDENT

BY ORDER OF THE SUPREME COURT THIS HEARING OFFICER WAS APPOINTED 'SPECIAL MASTER' TO CREATE A FACTUAL RECORD AND RECOMMENDED FINDINGS OF FACT ON ISSUES SET FORTH IN THE

SUPREME COURT'S LETTER TO THIS OFFICER DATED MARCH 3, 1994.

TESTIMONY WAS TAKEN ON MARCH 16, 17, 18, 19 AND 21, 1994. THE PERSONS WHO TESTIFIED WERE: JAMES MASTRIANI, CHAIRMAN, PUBLIC EMPLOYEES RELATIONS COMMISSION; WILLIAM BURRELL, CHIEF SUPERVISORY SERVICES, ADMINISTRATIVE OFFICE OF THE COURTS; RAYMOND RAINVILLE, CHIEF, CHILD SUPPORT SERVICES, ADMINISTRATIVE OFFICE OF THE COURTS; GREGORY B. WILCENSKI, CHIEF, JUVENILE PROBATION SERVICE, ADMINISTRATIVE OFFICE OF THE COURTS; HARVEY M. GOLDSTEIN, ASSISTANT DIRECTOR FOR PROBATION SERVICES, ADMINISTRATIVE OFFICE OF THE COURTS; CAROL LENAHAN, PRESIDENT, PROBATION OFFICERS CHAPTER, STATE OF FLORIDA POLICE BENEVOLENT ASSOCIATION; JUDE DEL PRE-ORE, CHIEF PROBATION OFFICER, MORRIS/SUSSEX VICINAGE AND PRESIDENT OF THE CHIEF PROBATION OFFICERS ASSOCIATION; PETER N. BRILL, CHIEF PROBATION OFFICER, BERGEN COUNTY; EUGENE J. MC GRATH, CHIEF PROBATION OFFICER, CAMDEN COUNTY; ROBERT F. KIRCHGESSNER, PROBATION OFFICER, PASSAIC COUNTY PROBATION DEPARTMENT; GREGORY MARTIN, SENIOR PROBATION OFFICER, BURLINGTON COUNTY PROBATION DEPARTMENT; DONALD W. REIMAN, ASSISTANT TO THE PRESIDENT, STATE OF NEW JERSEY POLICEMEN'S BENEVOLENT ASSOCIATION; GEORGE P. CHRISTIE, PROBATION OFFICER, MONMOUTH COUNTY PROBATION DEPARTMENT; PETER A. TORTORETO, SENIOR PROBATION OFFICER, CAMDEN

COUNTY PROBATION DEPARTMENT; DAVID SANTOBIANCO, PROBATION OFFICER, STATE OF DELAWARE; MARIO PAPAROZZI, NEW JERSEY DEPARTMENT OF CORRECTIONS.

THERE WERE OTHER PERSONS IN COURT AVAILABLE TO TESTIFY BUT COUNSEL DETERMINED THAT THEIR TESTIMONY WOULD BE CUMULATIVE AND THEY WERE NOT CALLED.

IN ADDITION TO TESTIMONY EXHIBITS WERE INTRODUCED INTO EVIDENCE AND NUMBERED AOC-1 TO AOC-26; PANJ-1 TO PANJ-35; FOP-1 TO FOP-5; CPO-1 AND CPO-2.

EIGHTEEN STIPULATIONS WERE READ INTO THE RECORD.

THE QUESTIONS FRAMED BY THE SUPREME COURT FOR WHICH IT DESIRED A FACTUAL RECORD AND RECOMMENDED FINDINGS OF FACT ARE:

1) WHAT IMPACT, IF ANY, WILL MEMBERSHIP OF PROBATION OFFICERS IN THE FOP OR THE STATE PBA HAVE ON THE PROBATION FUNCTION?

2) WILL THE AFFILIATION OF PANJ WITH THE STATE PBA RESULT IN MEMBERSHIP IN THE PBA OF PROBATION OFFICERS WHO ARE MEMBERS OF PANJ?

3) WHAT IS THE PRESENT NUMBER OF PROBATION OFFICERS WHO ARE MEMBERS OF THE FOP AND WHAT HAVE THEIR ACTIVITIES BEEN IN CONNECTION WITH THAT ORGANIZATION?

4) TO WHAT EXTENT, IF ANY, MAY PROBATION OFFICERS BECOME INVOLVED IN OR BE SEEN AS

SUPPORTING POLITICAL ACTIVITY AS A RESULT OF MEMBERSHIP IN EITHER FOP OR STATE PBA?

5) DOES THE LEGISLATION (N.J.S.A. 34:13A-5.3) PROHIBITING, SUBJECT TO CERTAIN EXCEPTIONS, POLICE OFFICERS FROM JOINING AN EMPLOYEE ORGANIZATION THAT ADMITS NON POLICE TO MEMBERSHIP IMPLY ANY LEGISLATIVE POLICY RELATED TO THE POTENTIAL IMPACT ON NON-POLICE MEMBERS OF SUCH AN ORGANIZATION?

THE INTEREST OF THE SUPREME COURT WAS AMPLIFIED BY COMMENTS AND SUB-QUESTIONS WITHIN EACH OF THE ABOVE CATEGORIES, AS SET FORTH IN THE COURT'S LETTER TO THE SPECIAL MASTER. THIS REPORT ATTEMPTS TO COMPLY WITH THAT DIRECTIVE.

THIS REPORT DOES *NOT* AND THE ASSIGNMENT OF THIS SPECIAL MASTER *WAS NOT INTENDED* TO MAKE FINDINGS CONCERNING THE QUESTION OF WHETHER A PROBATION OFFICER WAS A "LAW ENFORCEMENT OFFICER", NOR THE QUESTION OF THE PROPRIETY OR RIGHT OF ANY "UNION" TO BE A REPRESENTATIVE FOR COLLECTIVE BARGAINING PURPOSES OF PROBATION OFFICERS NOR THE QUESTION OF THE RIGHT OF PROBATION OFFICERS TO JOIN ANY PARTICULAR UNION.

QUESTION #1

PROBATION WAS ESTABLISHED BY STATUTE IN NEW JERSEY IN 1900, HOWEVER, PRIOR TO THAT TIME AN INFORMAL PROBATION SUPERVISION WAS USED BY

THE COURTS WHEN SENTENCING PERSONS CONVICTED OF THE COMMISSION OF A CRIME. SINCE THAT TIME THE FUNCTIONS OF THE PROBATION DEPARTMENT HAVE EXPANDED AND EXTEND FAR BEYOND THE SUPERVISION OF PEOPLE CONVICTED OF THE COMMISSION OF A CRIME.

PROBATION, IN NEW JERSEY, HAS ALWAYS BEEN THE DEPARTMENT USED TO PROVIDE SERVICES NEEDED BY THE JUDICIARY. IN THE AREA CONCERNED WITH CRIMINAL JUSTICE THE PROBATION DEPARTMENT CURRENTLY CONDUCTS BAIL INVESTIGATIONS AND PRE-TRIAL INTERVENTION INVESTIGATIONS (INCLUDING THOSE AUTHORIZED BY CDS STATUTES). POST-CONVICTION IT CONDUCTS PRE-SENTENCE INVESTIGATIONS. ALL INVESTIGATIONS ARE REDUCED TO REPORTS SUBMITTED TO THE COURT. PERSONS PLACED ON PROBATION, AFTER CONVICTION, OR AS A CONDITION OF BAIL OR AS A CONDITION OF PRE-TRIAL INTERVENTION, ARE SUPERVISED BY PROBATION OFFICERS. AT THE PRESENT TIME THERE ARE 72,000 ADULT CONVICTS UNDER THE SUPERVISION OF PROBATION OFFICERS AND AN ADDITIONAL 3,000 ADULTS UNDER SUPERVISION BUT NOT ON PROBATION (E.G. PRE-TRIAL INTERVENTION). THE PRESENT AVERAGE CASE LOAD FOR THOSE PROBATION OFFICERS SUPERVISING SUCH PEOPLE IS 175 CASES PER OFFICER, WHILE IN ONE COUNTY THE CASE LOAD IS 300 CASES PER OFFICER.

IN ADDITION TO ITS ACTIVITIES FOR THE CRIMINAL DIVISION OF THE SUPERIOR COURT, THE PROBATION DEPARTMENT IS CHARGED WITH CONDUCTING THE SAME OR SIMILAR ACTIVITIES FOR THE JUVENILE SECTION OF THE FAMILY DIVISION OF THE SUPERIOR COURT. AT THE PRESENT TIME THERE ARE 11,000 JUVENILES UNDER SUPERVISION OF THE PROBATION DEPARTMENT WITHIN THE STATE.

PROBATION HAS ALSO BEEN CHARGED WITH OTHER DUTIES. IT SERVES AS A COLLECTION ARM OF THE COURT IN CHILD SUPPORT CASES, OF WHICH THERE ARE PRESENTLY 267,000 SUCH CASES. IT IS REQUIRED TO CONDUCT INVESTIGATIONS CONCERNING CHILD CUSTODY, SEE TO COLLECTIONS IN CIVIL PENALTY CASES, SEEK OUT PLACES IN WHICH COMMUNITY SERVICE MAY BE PERFORMED, ASSIGN PERSONS TO SUCH WORK AND OVERSEE THE MYRIAD DETAILS IN CONNECTION THEREWITH. IN SHORT, THE PROBATION DEPARTMENT IS REQUIRED TO DO ANY ACT WHICH A COURT REQUIRES TO BE DONE TO ENABLE THE COURT TO PERFORM ITS DUTY.

THE TESTIMONY AND EVIDENCE SUBMITTED WITH RESPECT TO THE IMPACT OF MEMBERSHIP IN A POLICE ORGANIZATION UPON THE PROBATION FUNCTION WAS NOT SUCH THAT A TRUE FACTUAL DETERMINATION CAN BE MADE. THE TESTIMONY WAS OPINION AND SPECULATION.

THE ADMINISTRATIVE OFFICE OF THE COURTS VOICED THE FOLLOWING CONCERNS:

1) MEMBERSHIP MIGHT ENCOURAGE PROBATION OFFICERS TO COOPERATE WITH POLICE IN THE LAW ENFORCEMENT PROCESS, SUCH AS BEING AN INFORMANT OR ACTING IN AN 'UNDERCOVER' CAPACITY. THIS, IT IS BELIEVED, WOULD SEND A DOUBLE MESSAGE TO THE PROBATIONER WHO IS UNDER SUPERVISION.

2) PROBATION IS NOT LAW ENFORCEMENT, IT IS A BLEND OF DUTIES (IN THE CRIMINAL DIVISION) WHICH ENCOMPASS ENFORCEMENT OF THE COURT ORDER AND COUNSELING TO EFFECT A CHANGE IN BEHAVIOR. THE PROBATION OFFICER HAS SUBSTANTIAL DISCRETION IN DETERMINING WHEN AND IF TO ISSUE A COMPLAINT FOR VIOLATION OF PROBATION.

3) THE SUCCESS OF THE PROBATION FUNCTION OF ASSISTING A PERSON TO CHANGE HIS BEHAVIOR WILL BE ADVERSELY AFFECTED IF THE PROBATIONER LOOKS UPON THE PROBATION OFFICER AS A POLICEMAN RATHER THAN A HELPER.

4) PROBATION AS AN ARM OF THE JUDICIARY, MUST MAINTAIN THE SAME IMPARTIALITY AS THE COURT. THE REPORTS PREPARED FOR THE JUDICIARY MUST ALWAYS BE FAIR AND OBJECTIVE. ASSOCIATION WITH THE POLICE WOULD ADVERSELY AFFECT THE PERCEPTION OF THE PROBATIONER AND THE PUBLIC TOWARD THE PROBATION DEPARTMENT, SEEING IT AS NO LONGER AN IMPARTIAL ENTITY. IT IS FEARED THAT THE PUBLIC

WOULD CEASE TO BE COOPERATIVE WITH THE PROBATION OFFICER IF PROBATION WERE NO LONGER VIEWED AS AN IMPARTIAL ENTITY.

5) IT WOULD BE DIFFICULT TO MONITOR THE CONDUCT OF PROBATION OFFICERS BECAUSE THERE ARE MANY SUBTLE DISCRETIONARY DECISIONS WHICH PROBATION OFFICER MUST MAKE EVERY DAY IN SUPERVISING A PROBATIONER.

THE CONCERNS, AS EXPRESSED BY MEMBERS OF THE ADMINISTRATIVE OFFICE OF THE COURT, HAVE LITTLE EMPIRICAL EVIDENCE FROM WHICH A FACTUAL DETERMINATION MAY BE MADE CONCERNING THEIR VALIDITY. ON THE OTHER HAND, THERE IS LITTLE EMPIRICAL EVIDENCE TO INDICATE THEIR LACK OF VALIDITY. THOSE OFFICERS WHO TESTIFIED AND WHO HAVE BEEN MEMBERS OF THE FRATERNAL ORDER OF POLICE STATED THAT SUCH MEMBERSHIP DID NOT AFFECT THEIR PERFORMANCE OF DUTIES. MR. GOLDSTEIN TESTIFIED THAT HE HAS NO OBJECTIVE EVIDENCE RELATING TO PROBATION OFFICERS WHO WERE ALSO MEMBERS OF THE FRATERNAL ORDER OF POLICE NOR AS TO HOW SUCH MEMBERSHIP MAY HAVE AFFECTED THEM IN THE PERFORMANCE OF THEIR DUTIES. TWO OF THE CHIEFS OF PROBATION WHO TESTIFIED ADMITTED MEMBERSHIP IN THE FOB DURING THEIR TENURE AS PROBATION OFFICERS. SINCE THEY HAVE BEEN PROMOTED TO CHIEF, IT CAN BE INFERRED THAT THEIR DUTIES AND THEIR PERFORMANCE WAS NOT COMPROMISED BY SUCH MEMBERSHIP. A FACTUAL RECOMMENDATION IS DIFFICULT BECAUSE THE CONCLUSION TO BE

DRAWN WILL BE BASED UPON THE PHILOSOPHY AND EXPERIENCE OF THE DECISION MAKER, THAT IS

1) THE PERCEPTION OF HUMAN NATURE AS ABLE TO WITHSTAND THE SUBTLE BRIBERY OF FRIENDSHIP OR STEADFASTNESS IN LIVING UP TO THE MORAL AND ETHICAL STANDARDS REQUIRED BY A PARTICULAR EMPLOYMENT.

2) THE BELIEF IN THE PROFESSIONALISM OR LACK THEREOF OF PROBATION OFFICERS AS A WHOLE, OR AN INDIVIDUAL PROBATION OFFICER, IN THE PERFORMANCE OF DUTY AND ADHERENCE TO OATH.

THERE ARE PRESENTLY MEMBERS OF THE PROBATION DEPARTMENT WHO ARE FORMER POLICE OFFICERS (ONE WHO HAS RETAINED HIS MEMBERSHIP IN THE NEW JERSEY TROOPERS ASSOCIATION), MEMBERS WHO ARE MARRIED TO PRESENT POLICE OFFICERS AND MEMBERS WHO COUNT POLICE OFFICERS AMONG THEIR FAMILY AND FRIENDS. THUS, IT CAN BE FOUND THAT THE SUBTLE PRESSURES, ABOUT WHICH CONCERN HAS BEEN EXPRESSED, ALREADY EXIST. THERE WAS NO EVIDENCE PRESENTED THAT THESE PARTICULAR MEMBERS HAVE VIOLATED THEIR OATHS OR DUTIES, HOWEVER, THERE WAS ALSO NO EVIDENCE THAT THESE OFFICERS WERE SUBJECTED TO ANY PARTICULAR SUPERVISION OR REVIEW WHICH COULD ESTABLISH THAT THE SAME DID NOT EXIST.

IN MOST OTHER STATES THE PROBATION DEPARTMENT IS A PART OF THE DEPARTMENT OF CORRECTIONS AND THE DUTIES OF PAROLE AND PROBATION ARE COMBINED, AT LEAST WITH RESPECT TO THE SUPERVISION OF ADULTS WHO HAVE BEEN CONVICTED OR CHARGED WITH THE COMMISSION OF A CRIME. IN THE OPINION OF A PROBATION OFFICER FROM FLORIDA AND AN OFFICER FROM DELAWARE, THERE WAS NO EFFECT UPON PERFORMANCE OF DUTIES BY BEING WITHIN ONE OFFICE, BY BEING PART OF THE DEPARTMENT OF CORRECTIONS NOR BY BEING ASSOCIATED WITH POLICE ASSOCIATIONS. IT MUST BE NOTED, HOWEVER, THAT THE FUNCTIONS DISCUSSED BY THESE WITNESSES, AND, INDEED, THE EMPHASIS OF ALL PARTIES TO THIS HEARING, WAS UPON ADULT CRIMINAL SUPERVISION. IT APPEARS THAT THE PROBATION DEPARTMENT OR OFFICE IN OTHER STATES DOES NOT HAVE THE MYRIAD DUTIES OF PROBATION OFFICERS IN NEW JERSEY.

WHILE A FAR MORE DETAILED AND INTENSE STUDY WOULD BE REQUIRED TO COME TO A FULLY SUSTAINABLE CONCLUSION BASED UPON EMPIRICAL DATA RATHER THAN OPINIONS, IT WOULD APPEAR THAT MEMBERSHIP IN THE FRATERNAL ORDER OF THE POLICE OR POLICEMEN'S BENEVOLENT ASSOCIATION WILL NOT AFFECT THE FUNCTIONS OF PROBATION.

THE IMPACT OF MEMBERSHIP IN POLICE ORGANIZATIONS UPON PROBATION OFFICERS MUST BE CONSIDERED FROM TWO ASPECTS:

1) THE EFFECT ON THEIR CONDUCT IN RELATION TO THE PROBATIONER

2) THE EFFECT ON THEIR MORALE

THE VALIDITY OF THE CONCLUSION REACHED ABOVE THAT MEMBERSHIP WILL NOT HAVE AN EFFECT ON THE FUNCTIONS OF PROBATION, THAT IS, THAT THE DUTIES WILL BE PERFORMED IS ASSUMED. THE QUESTION NOW POSED ASKS WHETHER, IN PERFORMING THOSE FUNCTIONS, THE PROBATION OFFICER WILL ACT DIFFERENTLY TOWARD THOSE HE IS TO SUPERVISE, COLLECT FROM OR INVESTIGATE.

AGAIN, THERE IS NO EVIDENCE ONE WAY OR THE OTHER. AGAIN, THE CONCLUSION WILL BE BASED UPON THE DECISION MAKER'S VIEW OF HUMAN NATURE AND THE PROFESSIONALISM OR LACK THEREOF OF ANY PARTICULAR OFFICER.

NO ONE PRESENTED EVIDENCE CONCERNING PROBATION OFFICERS VIEWS TOWARD THE FUNCTIONS OF COLLECTION OF PAYMENTS AND CHILD CUSTODY INVESTIGATIONS. IT WOULD SEEM, HOWEVER, THAT SINCE THOSE FUNCTIONS WOULD NOT BE AFFECTED BY MEMBERSHIP IN A POLICE ORGANIZATION THAT THE CONDUCT OF THE PROBATION OFFICER IN PERFORMING THOSE FUNCTIONS WOULD NOT BE AFFECTED.

EVIDENCE WAS RECEIVED CONCERNING THE ROLE OF SUPERVISION OF PROBATIONERS. THE TESTIMONY AND EXHIBITS FIRMLY ESTABLISH THAT THE

ADMINISTRATIVE OFFICE OF THE COURTS, THE PROBATION DEPARTMENTS, THE PROBATION OFFICERS AND THE JUDGES CONSIDER THE SUPERVISION FUNCTION OF THE PROBATION OFFICERS TO BE THE MOST IMPORTANT. [Exh. AOC-1 p.i Exec. Sum; I-Intro.]. RECOGNITION IS GIVEN BY ALL TO THE FACT THAT, ALTHOUGH SUCH SUPERVISION IDEALLY INCORPORATES ASSISTANCE AND COUNSELING AND THE "BROKER-ING' OF SERVICES NEEDED BY THE PROBATIONER, THERE IS LITTLE TIME THAT CAN BE SPENT ON FUNCTIONS OTHER THAN STRICT SUPERVISION AND ENFORCEMENT OF THE PROBATION ORDER. ONE OFFICER TESTIFIED THAT, AT BEST, HE CAN DEVOTE 30 MINUTES IN A WEEK TO THE ROLE OF COUNSELLOR, WHILE Exh. AOC-1 STATES THAT A PROBATION OFFICER CAN DEVOTE LESS THAN 10 MINUTE PER WEEK TO THE SUPERVISION OF EACH PROBATIONER.

IT WAS CLEAR TO THIS HEARING OFFICER THAT EVERYONE RECOGNIZES THAT THE INCREASE IN WORK LOAD HAS TRANSFORMED THE ORIGINAL IDEAL OF PROBATION FROM REHABILITATION TO, AS ONE WITNESS DESCRIBED IT, 'PRISON WITHOUT WALLS'. THE PRISON POPULATION HAS DOUBLED BETWEEN 1980 AND 1993 AND PROBATION CASE LOADS HAVE QUADRUPLED. WHILE CRIMINAL CONDUCT CONTINUES TO INCREASE AND AS PROBATION STAFFING FAILS TO INCREASE THE FUNCTION OF SUPERVISION WILL REMAIN THE PRIMARY FUNCTION OF THE PROBATION OFFICER. (TESTIMONY INDICATED THAT THERE IS A NEED FOR

TWICE AS MANY PROBATION OFFICERS AS PRESENTLY ARE EMPLOYED). AS SUCH, MEMBERSHIP IN A POLICE ORGANIZATION WILL NOT AFFECT THE CONDUCT OF THE PROBATION OFFICER TOWARD THE PROBATIONER. INDEED, Exh. AOC-1, p. 7 RECOGNIZES THAT "THE PROBATION OFFICER PLAYS A CRUCIAL ROLE IN PROTECTING THE COMMUNITY".

THE EVIDENCE ALSO INDICATED THAT PROBATIONERS CURRENTLY LOOK UPON PROBATION OFFICERS AS ENFORCERS OF THE COURT ORDER, ALTHOUGH IT DOES NOT APPEAR THAT THE AVERAGE PROBATIONER DRAWS A DISTINCTION BETWEEN A COURT ORDER AND THE LAW. WHILE IT WOULD HAVE BEEN HELPFUL TO HEAR FROM SOME PROBATIONERS, AND WHILE IT WOULD ADD SUBSTANCE TO ANY CONCLUSION TO DO A STUDY WITH MANY PROBATIONERS, THIS OFFICER BELIEVES, FROM THE EVIDENCE PRESENTED, THAT PROBATIONERS VIEW THE PROBATION OFFICER AS INVOLVED IN ENFORCING GOOD BEHAVIOR RATHER THAN AS AN INSTRUMENT FOR REHABILITATION. THE LEGISLATIVE POLICY AND THAT OF THE SUPREME COURT HAS SHIFTED FROM REHABILITATION TO PUNISHMENT SINCE THE ADOPTION OF NJSA 2C:1-1 ET SEQ IN 1978. PERSONS CONVICTED OF CRIME KNOW THAT. BASED UPON THAT CONCLUSION, THIS OFFICER RECOMMENDS A FACTUAL DETERMINATION THAT MEMBERSHIP IN THE FOP OR PBA WILL NOT AFFECT THE VIEW OF THE PROBATIONER TOWARD THE PROBATION OFFICER.

TREATING THE COMMUNITY AND THE PUBLIC AS THE SAME, IT IS APPARENT FROM THE ATTENTION

GIVEN BY THE MEDIA TO CRIME AND PUNISHMENT, THAT THE TEMPER OF THE TIMES FAVORS PUNISHMENT, NOT REHABILITATION. IN GENERAL, THE PUBLIC KNOWS LITTLE ABOUT THE ACTIVITIES AND FUNCTIONS OF ANY PROBATION DEPARTMENT. THE PUBLIC IS, HOWEVER, CONSTANTLY BOMBARDED IN ALL FORMS OF MEDIA WITH INFORMATION ABOUT THE NATURE AND NUMBER OF CRIMES COMMITTED. SOCIETY, THROUGHOUT THE AGES, HAS MOVED WITH THE PENDULUM OF HISTORY FROM SEVERE PUNISHMENT TO CONCEPTS OF REHABILITATION. WHILE THERE ARE STILL INDIVIDUALS FIRMLY COMMITTED TO REHABILITATION, SUCH AS THOSE DESCRIBED BY MR. GOLDSTEIN, THE MAJORITY FAVOR MORE STRICT PUNISHMENT. THIS IS ESTABLISHED BY THE SUCCESS OF THOSE CANDIDATES FOR ELECTIVE OFFICE WHOSE ANTI-CRIME RHETORIC LEADS TO ELECTION VICTORIES. ALTHOUGH IT IS MOST PROBABLE THAT THE PUBIC WOULD NOT KNOW WHETHER PROBATION OFFICERS WERE MEMBERS OF A POLICE ORGANIZATION, IT IS THIS OFFICER'S CONCLUSION THAT SUCH MEMBERSHIP WOULD BE APPLAUDED AND THAT THE IMPACT ON THE PUBLIC WOULD BE A FAVORABLE ONE. Exh. AOC-1, p.9 RECOGNIZES THAT CITIZENS DEFINE CRIMINAL JUSTICE IN TERMS OF PROTECTION AND PREVENTION. THE *FINAL REPORT OF THE COMMITTEE ON PROBATION MANAGEMENT* PREPARED FOR THE JUDICIAL CONFERENCE ON SANCTIONS AND PROBATION [Exh. AOC-2] STATES "ONE OF THE MOST BASIC EXPECTATION OF SOCIETY IS THAT ITS GOVERNMENT AGENCIES AND

THEIR EMPLOYEES WILL DISCHARGE THEIR RESPONSIBILITIES EFFECTIVELY. PARAMOUNT AMONG THOSE RESPONSIBILITIES IS THE IMPOSITION AND ENFORCEMENT OF CRIMINAL SANCTIONS, SUCH AS THOSE IMPOSED ON PROBATIONERS."

THE IMPACT ON THE NEUTRALITY OF THE PROBATION OFFICERS IS A QUESTION SIMILAR TO THAT DISCUSSED ABOVE. SINCE IT COULD NOT BE FOUND THAT MEMBERSHIP WOULD HAVE AN EFFECT UPON THE FUNCTIONS OF PROBATION NOR UPON THE CONDUCT OF THE PROBATION OFFICER TOWARD THE PROBATIONER, SHORT OF AN INDIVIDUAL OFFICER FAILING TO LIVE UP TO HIS OATH AND HIS DUTIES, THE CONCLUSION MUST BE THAT IT WILL DEPEND UPON THE INDIVIDUAL OFFICER AND HIS SENSE OF RIGHT AND WRONG. THERE CANNOT BE A GENERALIZED ANSWER WHICH WOULD ENCOMPASS ALL INDIVIDUALS HOLDING THE POSITION OF PROBATION OFFICER.

THERE WAS TESTIMONY, BY WAY OF OPINION, THAT SUCH MEMBERSHIP WOULD ENHANCE COOPERATION WITH AND THE COORDINATION OF EFFORTS WITH LAW ENFORCEMENT AGENCIES. THIS HEARING OFFICER REJECTS THOSE OPINIONS BASED UPON THE CLEAR TESTIMONY OF THE CHIEFS OF PROBATION WHO HAVE ARRANGED VARIOUS COOPERATIVE EFFORTS. THE COOPERATION EXISTS WITHOUT PROBATION OFFICERS BEING MEMBERS OF THE FOP OR PBA, BUT, IT MUST BE ACKNOWLEDGED THAT CHIEF PROBATION OFFICERS ARE MEMBERS OF THE CHIEF OF POLICE ASSOCIATION

WITH THE APPROVAL OF THE ADMINISTRATIVE OFFICE OF THE COURTS [Exh. CPO-1]

THE ABILITY TO SUPERVISE PROBATIONERS AND TO ENFORCE COURT ORDERS IS BELIEVED TO BE ENCOMPASSED IN THE ABOVE DISCUSSION CONCERNING THE IMPACT ON THE FUNCTIONS OF PROBATION AND THE IMPACT ON PROBATION OFFICERS.

QUESTION #2

IF PANJ BECOMES A LOCAL OF THE PBA THE INDIVIDUAL MEMBERS OF PANJ WILL BECOME MEMBERS OF THE PBA.[STIP. #1] ARTICLE I, SECTION 1 OF THE *CONSTITUTION AND BY-LAWS* (PANJ-21) OF THE PBA PROVIDES: "THIS ASSOCIATION . . . IS A STATE ORGANIZATION HAVING SUBORDINATE AND LOCAL BRANCHES WITHIN THE STATE. IT GRANTS CHARTERS TO LOCAL BRANCHES, AND *THE INDIVIDUAL MEMBERS OF EACH ARE MEMBERS OF THIS ASSOCIATION AND SUBJECT TO ITS CONTROL AND REGULATION.* (ART I, SEC. 1 & ART IV, SEC. 2(A). EVERY LOCAL AND EACH MEMBER THEREOF ACCEPTING AND RETAINING ITS CHARTER CONSENTS TO ALL OF THE PROVISIONS OF THESE BY-LAWS OR AMENDMENTS THERETO. [STIP. #2, #4, TEST. D. REIMAN] (EMPHASIS SUPPLIED)

THE CONSEQUENCES OF AFFILIATION ON PANJ MEMBERS AS DETERMINED FROM THE *CONSTITUTION AND BY-LAWS* ARE:

1) PROBATION OFFICERS WILL BE DETERMINED TO BE *LAW ENFORCEMENT OFFICERS* IN THE OPINION OF THE OFFICERS AND MEMBERS OF THE PBA.

2) PANJ AS A LOCAL OF THE PBA "MAY ENDORSE CANDIDATES FOR LOCAL POLITICAL OFFICE ONLY AFTER THE STATE PRESIDENT IS NOTIFIED AND HAS APPROVED. (ART.II, SEC. 2

3) PANJ WILL BE SUBJECT TO THE JURISDICTION OF THE STATE PBA "AT ALL TIMES", BOTH OF THE LOCAL AND "ITS RESPECTIVE MEMBERS" (ART. III, SEC.1(C). (THIS IS TO BE CONTRASTED WITH THE TESTIMONY THAT EACH LOCAL IS AUTONOMOUS)

4) PANJ AND ITS MEMBERS WILL BE SUBJECT TO THE AUTHORITY OF THE STATE PBA "TO APPROVE, MODIFY OR REJECT ANY LOCAL BY-LAW.." (ART III, SEC. 1 (D)

5) PANJ AND ITS MEMBERS WILL BE SUBJECT TO THE STATE PBA AUTHORITY "TO PRESCRIBE ANY ADDITIONAL QUALIFICATIONS OR CONDITIONS FOR OBTAINING OR RETAINING MEMBERSHIP HEREIN[STATE PBA] AND IN ANY LOCAL THEREOF" (ART. III, SEC. 1 (G)

6) STATE PBA HAS POWER "TO PROVIDE A SUITABLE REWARD TO BE PAID TO INFORMANTS PROVIDING INFORMATION, LEADING TO THE ARREST AND CONVICTION OF ANY PERSON WHO IS FINALLY CONVICTED OF ASSAULTING OR KILLING A P.B.A. MEMBER" (ART. III, SEC.1,(I)

7) PANJ SHALL BE OBLIGED TO SEEK AND OBTAIN RECOGNITION OR CERTIFICATION AS THE

EXCLUSIVE MAJORITY REPRESENTATIVE OF EMPLOYEES(ART III, SEC.2) (THIS IS TO BE CONTRASTED WITH STIPULATION #9 WHICH STATES "IT IS NOT A PREREQUISITE OF AFFILIATION WITH THE P.B.A. THAT A LOCAL BE A COLLECTIVE NEGOTIATIONS REPRESENTATIVE)

8) MEMBERSHIP REQUIRES "COMPLETION OF PTC TRAINING AND CERTIFICATION" (ART. IV, SEC. 1(A)

9) "THE GOVERNING AND LEGISLATIVE POWER AND CONTROL OF THIS ASSOCIATION [STATE PBA] ARE VESTED IN A BOARD OF STATE DELEGATES CONSISTING OF A REPRESENTATIVE FROM EACH LOCAL ASSOCIATION. (ART. V, SEC. 1).

10) EACH LOCAL ELECTS A STATE DELEGATE WHO, AMONG OTHER THINGS, "SHALL MAINTAIN PUBLIC RELATIONS WITH LOCAL LEGISLATORS.."

11) MEMBERSHIP MUST BE EXCLUSIVE IN PBA. "ANY INDIVIDUAL MEMBERS OF ANY LOCAL ASSOCIATION WHO SHALL JOIN OR BECOME A MEMBER OF ANY OTHER POLICE OR LAW ENFORCEMENT AGENCY OF WHICH HE OR SHE IS A MEMBER, A PURPOSE OF SUCH ORGANIZATION BEING TO REPRESENT POLICEMEN OR LAW ENFORCEMENT OFFICERS IN MATTERS AFFECTING THEIR EMPLOYMENT OR ECONOMIC WELFARE, SHALL BE EXPELLED FROM THIS ASSOCIATION AND THE LOCAL ASSOCIATION." (ART. VIII, SEC. 1)

12) ART. XII REFERS TO THE ATTORNEY FOR THE ASSOCIATION, SEC. 2(B) REFERS TO THE

LOCALS. THE DUTY OF THE ATTORNEY SHALL BE, AMONG OTHERS, TO "PREPARE ALL LEGISLATION".

13) ART. XIX CONTEMPLATES SUPPORT OR OPPOSITION TO LEGISLATION WHICH SHALL BE DETERMINED BY THE STATE BOARD OF DELEGATES.

14) ARTICLE XXI CONTEMPLATES THE ISSUANCE OF "SAFETY CARDS" BY INDIVIDUAL OFFICERS.

15) ARTICLE XXII CONTEMPLATES THE ISSUANCE OF 'CAR SHIELDS' TO MEMBERS.

16) NO MEMBER SHALL INSTITUTE COURT PROCEEDINGS AGAINST THE STATE PBA OR ANY LOCAL WITHOUT FIRST SEEKING REDRESS FROM THE ASSOCIATION. (ART. XXIV, SEC. 1)

IT IS NOT KNOWN TO WHAT EXTENT THE OFFICERS OR MEMBERS OF PANJ ARE FAMILIAR WITH THE REQUIREMENTS OF THE STATE PBA *CONSTITUTION AND BY-LAWS*. IT IS KNOWN HOWEVER, THAT THE MEMBERS OF PANJ OVERWHELMINGLY VOTED TO JOIN THE PBA. THAT EXPRESSION OF THE MEMBERSHIP, AS WELL AS THE TESTIMONY PRESENTED, LEADS TO THE CONCLUSION THAT AFFILIATION WITH THE PBA WILL BE BENEFICIAL TO THE MORALE OF THE PROBATION OFFICERS.

THE CONSEQUENCE OF SUCH AFFILIATION, HOWEVER, WHEN MEASURED AGAINST THE *CONSTITUTION AND BY-LAWS*, AS IDENTIFIED ABOVE, ARE APPARENT. EACH PROBATION OFFICER WILL BE SUBJECT TO THE CONTROL AND REGULATIONS OF THE STATE PBA. PROBATION OFFICERS MAY BE

PLACED IN THE POSITION OF SUPPORTING OR OPPOSING POLITICAL CANDIDATES OR LEGISLATION WHICH MAY OR MAY NOT BE IN THE BEST INTEREST OF PROBATION OFFICERS. PROBATION OFFICERS MAY BE PLACED IN A CONFLICT POSITION WHERE THE STATE ORGANIZATION OFFERS A MONETARY REWARD IN CONNECTION WITH THE ARREST AND CONVICTION OF A DEFENDANT CONVICTED OF ASSAULTING OR KILLING A PBA MEMBER. THIS, AGAIN IS AN AREA WHERE THE INDIVIDUAL INTEGRITY AND PROFESSIONALISM OF THE OFFICER IS INVOLVED. THERE IS NO DETERMINATION THAT SUCH MEMBERSHIP AND SUCH ACTION ON THE PART OF THE STATE PBA WOULD CAUSE ANY OFFICER TO FAIL TO PROPERLY PERFORM HIS DUTIES, IT IS MERELY THE RECOGNITION OF A POSSIBLE CONSEQUENCE OF AFFILIATION.

MEMBERS OF PANJ WILL BE UNABLE TO SELECT A COLLECTIVE BARGAINING AGENT OTHER THAN PANJ WHICH IS A LOCAL OF THE PBA. ALTHOUGH THE STATE PBA IS NOT DIRECTLY INVOLVED IN COLLECTIVE BARGAINING, IT DOES PROVIDE ADVISERS AND RENDERS OTHER ASSISTANCE. THIS CAN BE A BENEFICIAL CONSEQUENCE OF AFFILIATION. (LAST PART OF STIP. #5)

INDIVIDUAL MEMBERS MUST COMPLETE PTC TRAINING AND CERTIFICATION. THE ABILITY TO COMPLETE SUCH TRAINING WILL HAVE AN EFFECT UPON THE AVAILABLE TIME OF THE PROBATION OFFICER. SINCE IT IS A REQUIREMENT OF THE STATE PBA FOR MEMBERSHIP, IT IS ASSUMED THAT THE TIME NECESSARY TO COMPLETE THE TRAINING

PROGRAM WILL BE A SUBJECT OF THE COLLECTIVE BARGAINING PROCESS. EXCUSE FROM REGULAR DUTIES WILL HAVE A CONSEQUENCE TO THE PROBATION DEPARTMENT AND ITS FUNCTIONS.

THE REQUIREMENT THAT THE STATE DELEGATE MAINTAIN RELATIONS WITH LOCAL LEGISLATORS WILL INVOLVE THAT PROBATION OFFICER IN SOME KIND OF POLITICAL ACTIVITY. (STIP. #10)

CURRENTLY, MOST COUNTY PROBATION ASSOCIATIONS ARE THERE [sic] OWN COLLECTIVE BARGAINING UNIT AND REPRESENTATIVES, BUT THE COMMUNICATIONS WORKERS OF AMERICA IS A UNION WHICH REPRESENTS SOME VICINAGES. AFFILIATION BY PANJ WITH THE PBA WILL HAVE THE CONSEQUENCE OF PROHIBITING THOSE COUNTY PROBATION DEPARTMENTS FROM BEING REPRESENTED BY THE CWA. HOWEVER, WITH THE STATE TAKE OVER OF ALL PROBATION DEPARTMENTS THERE WILL NO LONGER BE INDIVIDUAL COUNTY EMPLOYEE GROUPS. SINCE THERE HAS ALREADY BEEN A LARGE VOTE IN FAVOR OF AFFILIATION WITH THE PBA IT IS REASONABLE TO INFER THAT, IN A REPRESENTATION ELECTION, THE MAJORITY WILL VOTE FOR PANJ AS ITS REPRESENTATIVE. HOWEVER, NO EVIDENCE WAS PRESENTED WITH RESPECT TO THE REPRESENTATION RIGHTS WHICH NOW EXIST IN THE CWA. IT IS TO BE NOTED THAT THE CWA WAS NOT A PARTY TO THE HEARING CONDUCTED AND THE SPECIFIC QUESTION OF UNION REPRESENTATION WAS NOT PART OF THE CHARGE TO THIS SPECIAL MASTER.

AN IMPORTANT CONSEQUENCE OF MEMBERSHIP IN THE PBA IS THE AUTHORITY GIVEN TO THE INDIVIDUAL MEMBERS TO ISSUE "SAFETY CARDS" AND INSTALL PBA, CAR SHIELDS, IN A MANNER NOW DONE BY POLICE OFFICERS. IF THIS CONDUCT IS REGULATED AND SUPERVISED BY THE CHIEF PROBATION OFFICERS IN EACH VICINAGE, IT WILL NOT NECESSARILY HAVE A BAD EFFECT. IT IS NOTED IN RESPONSE TO THE Question OF CONSEQUENCES OF AFFILIATION.

THIS SPECIAL MASTER DOES NOT SEE ANY CONSEQUENCES, FOR GOOD OR ILL, UPON THE CURRENT PBA MEMBERS. SINCE PUBLIC EMPLOYEES ARE NOT PERMITTED TO STRIKE, THERE IS NO BENEFIT TO EITHER GROUP IN ITS COLLECTIVE BARGAINING.

THE CONSEQUENCE OF AFFILIATION TO THE ORGANIZATION OF THE PROBATION OFFICERS ASSOCIATION IS SIMILAR TO THE CONSEQUENCES TO EACH INDIVIDUAL MEMBER AS SET FORTH IN THE DISCUSSION OF THE *CONSTITUTION AND BY-LAWS* OF THE STATE PBA. IT WILL LOSE ITS PRESENT AUTONOMY AS AN ORGANIZATION.

QUESTION #3

THERE ARE BETWEEN 700 AND 800 NEW JERSEY PROBATION OFFICERS WHO ARE PRESENTLY MEMBERS OF THE FRATERNAL ORDER OF POLICE, (STIPULATION #12, 13, 14, 15, 16) AND HAVE BEEN FOR 20 YEARS. IT IS NOTED THAT DISOBEDIENCE OF A SUPREME COURT DIRECTIVE DOES NOT JUSTIFY CONTINUED DISOBEDIENCE, HOWEVER, EVENTS

OCCURING OR FAILING TO OCCUR DURING THAT TIME WILL BE EVIDENTIAL IN THIS HEARING.

THE CERTIFICATE OF INCORPORATION OF THE FRATERNAL ORDER OF POLICE RECITES:

"2. THE PURPOSE FOR WHICH THIS CORPORATION IS FORMED IS TO FURTHER AND ENCOURAGE A HIGHER DEGREE OF SKILL, EFFICIENCY AND DISCIPLINE AMONG ALL PERSONS WHO ARE OR MAY BECOME EMPLOYED IN ANY RANK THEREOF AS POLICE OFFICERS, PARK GUARDS, STATE POLICE, OR AS POLICE OFFICERS OR LAW ENFORCEMENT OFFICERS OF ANY PORT AUTHORITY OR INTERSTATE COMMISSION, OR BY ANY FEDERAL, STATE OR MUNICIPAL ENTITY, OR ANY POLITICAL SUBDIVISION THEREOF, FOR THE PROTECTION OF PUBLIC SAFETY; TO CULTIVATE FRIENDSHIP AMONG ITS MEMBERS; AND TO IMPROVE THE MORAL, INTELLECTUAL, SOCIAL AND ECONOMIC CONDITIONS OF THE ACTIVE MEMBERS OF THIS ASSOCIATION BY CONDUCTING, MAINTAINING, AND OPERATING THROUGH SUBORDINATE LOCAL LODGES OR CHAPTERS, TOGETHER WITH AFFILIATED LADIES AUXILIARIES, AND SUCH OTHER MEMBERSHIPS OF PUBLIC SPIRITED CITIZENS AS MAY BE ADDED THERETO FROM TIME TO TIME. IT IS A CORPORATION WHICH DOES NOT CONTEMPLATE ANY PECUNIARY PROFIT OR GAIN, EITHER INCIDENTAL OR OTHERWISE, TO ITS MEMBERS. THIS CORPORATION IS NOT A LABOR UNION; AND IT SHALL NOT BE OR BECOME

AFFILIATED, EITHER DIRECTLY OR INDIRECTLY WITH ANY COMMITTEE, CONGRESS, FEDERATION, ORGANIZATION OR UNION OF INDUSTRIAL WORKERS."

THE TESTIMONY OF THOSE PROBATION OFFICERS WHO ARE MEMBERS OF THE FRATERNAL ORDER OF POLICE, WHICH TESTIMONY IS ACCEPTED AS TRUE, IS THAT THE ORGANIZATION WAS SOCIAL AND FRATERNAL, THAT THE INDIVIDUAL LODGES TO WHICH THE MEMBERS BELONGED NEVER ENGAGED IN ANY POLITICAL ACTIVITY FOR OR AGAINST CANDIDATES OR FOR OR AGAINST LEGISLATION. THESE PROBATION OFFICERS STATED THAT THEY WERE NEVER ASKED FOR HELP IN THE DETECTION OF CRIME OR ENFORCEMENT BY POLICE MEMBERS.

FROM THE TESTIMONY IT WOULD APPEAR THAT THE EXPERIENCE OF THESE MEMBERS OF THE FRATERNAL ORDER OF POLICE WAS A SOCIAL AND FRATERNAL ONE.

THE BY-LAWS OF THE NEW JERSEY STATE LODGE FRATERNAL ORDER OF POLICE (Exh. FOP-5) SETS FORTH VIRTUOUS PURPOSES IN ITS PREAMBLE AND CONTAINS, AMONG OTHERS, A PLEDGE "TO USE ALL HONORABLE MEANS TO PROMOTE POLICE LEGISLATION AND A GREATER SOCIABILITY AND FRATERNITY IN THE STATE OF NEW JERSEY." THE BY-LAWS ALSO PROVIDE:

1) THE ORGANIZATION IS STRICTLY NON-POLITICAL AND SHALL HAVE NO AFFILIATION WITH ANY LABOR UNION OR POLITICAL ACTION COMMITTEE. (ART. I, SEC. 2)

2) PROVIDES FOR ASSOCIATE MEMBERS OF PERSONS INTERESTED IN THE WELFARE OF THE POLICE AND THEIR PROFESSION. [ART. II, SEC. 1(C)]

NO EVIDENCE WAS PRESENTED WITH RESPECT TO THE NATURE AND QUALITY OF THE ACTIVITIES OF THE MEMBERS OF THE FRATERNAL ORDER OF POLICE OTHER THAN AS INDICATED. THE RECOMMENDED FINDING OF FACT, THEREFORE, IS THAT THE FRATERNAL ORDER OF POLICE IN NEW JERSEY IS A SOCIAL AND FRATERNAL ASSOCIATION AND THAT THE ACTIVITIES OF ITS MEMBERS ARE SOCIAL, NON POLITICAL AND NON LABOR ORIENTED. HOWEVER, LODGES IN OTHER STATES HAVE REPRESENTED PROBATION OFFICERS IN COLLECTIVE BARGAINING. [STIP. #17, Exh. PANJ-35]

QUESTION #4

WITHOUT REPEATING THE DISCUSSION IN #3 AND #2 ABOVE:

THE FRATERNAL ORDER OF POLICE IS NOT ENGAGED IN PARTISAN POLITICAL ACTIVITY.

THE POLICEMEN'S BENEVOLENT ASSOCIATION IS, FROM TIME TO TIME, ENGAGED IN PARTISAN POLITICAL ACTIVITY. IT MAY SUPPORT OR OPPOSE CANDIDATES FOR ELECTIVE OFFICE AND SUPPORT OR OPPOSE LEGISLATION. THE TESTIMONY INDICATED THAT THIS ACTION ON LEGISLATION IS NORMALLY CONFINED TO LEGISLATION WHICH AFFECTS THE MEMBERS OF THE PBA, HOWEVER, THERE IS NO LIMITATION IN ITS CONSTITUTION

AND BY-LAWS, AS THERE IS IN THE BY-LAWS OF THE FRATERNAL ORDER OF POLICE. IT SHOULD BE NOTED THAT THE USE OF THE WORD "PARTISAN" IS NOT INTENDED TO DESCRIBE THE PBA AS BEING PRE DISPOSED FOR OR AGAINST ANY POLITICAL PARTY. IT IS RECOGNIZED THAT ITS ACTIVITY, ALTHOUGH IN SUPPORT OF OR OPPOSITION TO A CANDIDATE FOR ELECTIVE OFFICE, IS NOT DETERMINED BY THE POLITICAL PARTY TO WHICH THAT CANDIDATE BELONGS.

QUESTION 5

JAMES MASTRIANI, CHAIRMAN OF PERC TESTIFIED THAT THERE IS LITTLE LEGISLATIVE HISTORY AVAILABLE CONCERNING NJSA 34:13A-5.3. IN INTERPRETING THAT LEGISLATION PERC HAS RELIED ON THE RATIONALE EXPRESSED BY THE COURTS.

THE CHAIRMAN'S OPINION IS THAT THE STATUTE WAS DESIGNED TO PROTECT THE PUBLIC EMPLOYERAND THE PUBLIC FROM PROBLEMS THAT COULD DEVELOP IN LABOR DISPUTES IF THE POLICE OFFICERS WERE SUBJECTED TO DIVIDED LOYALTIES. POLICE ARE TO PROTECT PERSON AND PROPERTY, EVEN IN A LABOR DISPUTE. THE DIVIDED LOYALTY COULD ARISE IF A POLICE MEN WAS A MEMBER OF THE SAME UNION AS THE EMPLOYEE WHO WAS ON STRIKE AGAINST A NON PUBLIC EMPLOYER.

MR. MASTRIANI BELIEVES THE PURPOSE OF THE STATUTE IS TO HAVE COLLECTIVE BARGAINING WITHOUT DIVIDED LOYALTIES AND TO AVOID PROBLEMS THAT COULD ARISE IF POLICE AND NON

POLICE WERE MEMBERS OF THE SAME BARGAINING UNIT.

IT IS TO BE NOTED THAT EACH LOCAL OF THE PBA IS A SEPARATE BARGAINING UNIT FOR ITS MEMBERS AND THAT PANJ, AS A LOCAL, WOULD BE THE BARGAINING UNIT FOR THE PROBATION OFFICERS.

IT WAS NOT THE DUTY OF THIS SPECIAL MASTER TO INTERPRET OR APPLY THE STATUTE TO EITHER POLICE OFFICERS OR PROBATION OFFICERS. THERE IS NO DETERMINATION BY THIS SPECIAL MASTER THAT THE STATUTE WILL OR WILL NOT APPLY TO POLICE LOCALS OR PROBATION OFFICER LOCALS OF THE PBA. THE APPLICABILITY OF THE STATUTE WITH RESPECT TO THE POLICE IS THE INITIAL FUNCTION OF PERC. THE COMMISSION WILL CONDUCT ITS OWN INVESTIGATION INTO THE DUTIES AND POWERS OF THE MEMBERS AND WILL MAKE ITS OWN DETERMINATION OF WHETHER PERSONS ARE CLASSIFIED AS POLICE OR NON POLICE. THE CHAIRMAN STATED THAT ALL CASES OF THIS KIND ARE FACT SENSITIVE. GENERALLY, THE POWER OF ARREST, THE RIGHT/DUTY TO CARRY A GUN, TO DETECT CRIME, APPREHEND CRIMINALS WILL BE EVIDENCE OF POLICE ACTIVITY, HOWEVER, HE COULD NOT APPLY THE CRITERIA IN THE ABSTRACT.

IT IS TO BE NOTED THAT PERC'S JURISDICTION DOES NOT EXTEND TO THE EMPLOYEES OF THE JUDICIAL BRANCH OF GOVERNMENT. IF PERC WERE TO DETERMINE THAT PROBATION OFFICERS ARE NOT PROPERLY WITHIN THE CATEGORY OF POLICE,

THAT DETERMINATION WOULD AFFECT THE POLICE LOCALS OF THE PBA BUT NOT THE PROBATION OFFICER LOCAL. PERC DOES NOT ACT ON BEHALF OF THE JUDICIARY AUTOMATICALLY. IT WILL GIVE ADVICE, WHEN REQUESTED. IT WILL ACT WHEN THE JUDICIARY GIVES IT THE RIGHT TO PROCEED. SHOULD THAT AUTHORITY BE DELEGATED TO PERC BY THE JUDICIARY, THEN THE COMMISSION WILL HANDLE THE MATTER IN THE SAME WAY THAT IT HANDLES ALL MATTERS, HOWEVER, IT CAN ONLY MAKE A RECOMMENDATION TO THE JUDICIARY, IT CANNOT ENTER ANY ORDER NOR ENFORCE ANY RECOMMENDATION.

SUMMARY

RECOMMENDED FINDINGS OF FACT:

1) MEMBERSHIP IN THE FRATERNAL ORDER OF POLICE OR THE POLICEMEN'S BENEVOLENT ASSOCIATION WILL NOT IMPACT THE FUNCTION OF PROBATION IF THE PROBATION OFFICER IS AN ETHICAL PROFESSIONAL WITH INTEGRITY.

2) THE PHILOSOPHICAL CONCERNS EXPRESSED BY THE ADMINISTRATIVE OFFICE OF THE COURT EXIST FROM FAMILIAL AND SOCIETAL ASSOCIATIONS, REGARDLESS OF MEMBERSHIP IN ANY FORMAL ORGANIZATION.

3) THE EXPERIENCE IN OTHER STATES WHEREIN THE FUNCTION OF PROBATION AND PAROLE ARE UNITED IN ONE DEPARTMENT, AND OFTEN IN ONE OFFICER, HAS NOT DEMONSTRATED

ANY ADVERSE IMPACT UPON THE FUNCTION OF PROBATION.

4) THE PRESENT INADEQUATE NUMBER OF PROBATION OFFICERS AND THE LARGE NUMBER OF PROBATIONERS HAS CAUSED PROBATION TO BECOME AN ORGANIZATION WHICH IS EXPECTED TO PROTECT SOCIETY AND DETER THE COMMISSION OF CRIME.

5) PROBATION OFFICERS, PROBATIONERS AND THE GENERAL PUBLIC VIEW PROBATION AS SUPERVISION AND ENFORCEMENT OF THE TERMS OF PROBATION, AND AS A FORM OF PUNISHMENT

6) THE AFFILIATION OF PANJ WITH THE STATE PBA WILL RESULT IN PROBATION OFFICERS BECOMING MEMBERS OF THE PBA.

7) AFFILIATION OF PANJ WITH THE STATE PBA WILL RESULT IN THE PBA CONSIDERING PROBATION OFFICERS TO BE "LAW ENFORCEMENT OFFICERS".

8) AFFILIATION OF PANJ WITH THE STATE PBA WILL RESULT IN PANJ AND EACH PROBATION OFFICER MEMBER BEING SUBJECT TO THE JURISDICTION OF THE STATE PBA, INCLUDING ANY FUTURE REQUIRED QUALIFICATIONS.

9) AFFILIATION OF PANJ WITH THE STATE PBA WILL RESULT IN THE REQUIREMENT THAT PANJ OBTAIN RECOGNITION AS THE EXCLUSIVE MAJORITY REPRESENTATIVE FOR COLLECTIVE BARGAINING PURPOSES.

10) AFFILIATION OF PANJ WITH THE STATE PBA WILL REQUIRE ALL PROBATION OFFICER MEMBERS OF PANJ TO COMPLETE A PTC TRAINING PROGRAM.

11) PROBATION OFFICER MEMBERS OF 'PBA' PANJ WILL BE PERMITTED TO ISSUE PBA 'SAFETY CARDS' AND RECEIVE 'PBA' SHIELDS FOR THEIR AUTOMOBILES.

12) IN AN ELECTION WHICH PERMITTED ONLY A VOTE FOR AFFILIATION WITH THE STATE PBA OR NO AFFILIATION, SUCH AFFILIATION RECEIVED AN OVERWHELMING VOTE OF THE MEMBERS OF PANJ.

13) AFFILIATION OF PANJ WITH THE STATE PBA WILL PRODUCE A REPRESENTATIVE ELECTION WITH THE COMMUNICATION WORKERS OF AMERICA AND, POTENTIALLY, OTHER LABOR UNIONS.

14) PROBATION OFFICERS HAVE BEEN MEMBERS OF THE FRATERNAL ORDER OF POLICE FOR APPROXIMATELY 20 YEARS.

15) THERE ARE PRESENTLY BETWEEN 700-800 PROBATION OFFICERS WHO ARE MEMBERS OF VARIOUS LODGES OF THE FRATERNAL ORDER OF POLICE.

16) THE FRATERNAL ORDER OF POLICE IS PRIMARILY A SOCIAL AND FRATERNAL ACSSOCIATION [sic].

17) PANJ, PBA AND FOP HAVE ENGAGED IN POLITICAL ACTIVITY AS ORGANIZATIONS.

18) A PROHIBITION BY THE SUPREME COURT AGAINST POLITICAL ACTIVITIES BY MEMBERS OF

ANY ORGANIZATION WOULD HAVE TO EXEMPT THE INDIVIDUAL OFFICERS ENGAGED IN SUCH ACTIVITY ON THE PART OF THE ORGANIZATION.

19) NJSA 34:13A-5.3 RESTRICTS POLICE OFFICERS FROM BEING MEMBERS OF AN EMPLOYEE ORGANIZATION (COLLECTIVE BARGAINING UNIT) WHICH ALSO REPRESENTS NON POLICE EMPLOYEES.

20) THE STATUTE IS TO PROTECT THE PUBLIC EMPLOYER AND THE PUBLIC FROM THE POTENTIAL OF DIVIDED LOYALTY ON THE PART OF A POLICEMAN. ANY EFFECT UPON THE POLICE OR NON-POLICE MEMBERS OF AN ORGANIZATION WHICH ADMITS BOTH TO MEMBERSHIP IS A TANGENTIAL EFFECT.

EPILOGUE

THE SPECIAL MASTER BELIEVES THAT THE PRECEDING REPORT HAS COMPLIED WITH THE MANDATE OF THE SUPREME COURT AS SET FORTH IN ITS LETTER DATED MARCH 3, 1994. HOWEVER, BECAUSE OF THE SERIOUSNESS OF THE ISSUE AND BECAUSE THE SPECIAL MASTER WAS PERMITTED FLEXIBILITY IN THE CONDUCT OF THE HEARING, IT IS BELIEVED THAT OTHER MATTERS SHOULD BE CALLED TO THE COURT'S ATTENTION.

THE ISSUE WHICH THE COURT SOUGHT TO REVISIT, BY ITS APPOINTMENT OF THE SPECIAL MASTER, CONCERNED THE CONTINUING APPROPRIATENESS

OF THE INTERPRETATION OF THE COURT'S 1975 DISAPPROVAL OF A PROBATION OFFICER'S APPLICATION TO BECOME A MEMBER OF THE FRATERNAL ORDER OF POLICE.THIS INTERPRETATION WAS SET FORTH IN THE APRIL 8, 1976 MEMO OF THEN AOC ASSISTANT DIRECTOR OF PROBATION FRED D. FANT AND ITS REAFFIRMATION BY ASSISTANT DIRECTOR GOLDSTEIN. THE ATTORNEYS INVOLVED IN THE PRESENT HEARING, HOWEVER, SOUGHT TO OBTAIN A DETERMINATION OF WHETHER A PROBATION OFFICER WAS A 'LAW ENFORCEMENT OFFICER' AND, A DETERMINATION CONCERNING THE RIGHT OF EMPLOYEES TO JOIN A UNION OF THEIR CHOICE. MANY WITNESSES TESTIFIED WITH SUCH VIEW AND MANY OF THE EXHIBITS PLACED INTO EVIDENCE WERE DESIGNED TOWARD THIS END. BECAUSE THE RULES OF EVIDENCE DID NOT APPLY, THE SPECIAL MASTER ACCEPTED ALL TESTIMONY AND EXHIBITS WHICH WERE PROFFERED, HOWEVER, THE REPORT CONTAINS NO RECOMMENDED FINDINGS OF FACT OR CONCLUSIONS ON EITHER OF THESE QUESTIONS.

THE SPECIAL MASTER SUGGESTS TO THE COURT THAT IT'S [sic] DECISION CONCERNING THE PROPRIETY OF PROBATION OFFICER MEMBERSHIP IN THE PATROLMEN'S BENEVOLENT SOCIETY OR THE FRATERNAL ORDER OF POLICE, WHILE NOT HAVING AN IMPACT ON THE PROBATION FUNCTION NOR THE MANNER IN WHICH A PROFESSIONAL PROBATION OFFICER CONDUCTS HIS DUTIES, MAY HAVE COLLATERAL EFFECTS.

THE SPECIAL MASTER DOES NOT BELIEVE THAT THE RIGHT OF EMPLOYEES TO BARGAIN COLLECTIVELY THROUGH AN AGENT OF THEIR OWN CHOICE IS GOVERNED BY MEMBERSHIP IN THE PBA OR FOP. THE LAW WILL REQUIRE A REPRESENTATION ELECTION AT THE PROPER TIME.

THE ARGUMENT THAT PAROLE OFFICERS SUPERVISE PERSONS CONVICTED OF MORE SERIOUS CRIME IS NOT ESTABLISHED BY THE FACTS, BUT THAT MAKES LITTLE DIFFERENCE IN DETERMINING WHETHER AN EMPLOYEE OF THE JUDICIARY MAY BE A MEMBER OF A POLICE ORGANIZATION.

PROBATION OFFICERS ARE CONCERNED THAT RULE 1:33 IS THE BEGINNING OF A TREND TO ELIMINATE PROBATION DEPARTMENTS. THIS MAY MOTIVATE A DESIRE TO BECOME PART OF A STRONG UNION BUT DOES NOT ADDRESS THE QUESTION OF WHETHER AN EMPLOYEE OF THE JUDICIARY MAY BE ASSOCIATED WITH PERSONS EMPLOYED BY THE EXECUTIVE BRANCH. THE COURT SHOULD BE MADE AWARE, HOWEVER, THAT THERE IS A STRONG UNDERCURRENT OF BITTERNESS AMONG PROBATION OFFICERS. THE RECENT DIVISION OF THE COURT WITH THE ESTABLISHMENT OF CASE MANAGEMENT OFFICES AND THE ASSIGNMENT OF PROBATION OFFICERS TO SUCH OFFICES WITH SUPERVISION BY NON-MEMBERS OF THE PROBATION DEPARTMENT HAS CONTRIBUTED TO THEIR CONCERN FOR THEIR JOBS AND FOR THE OPPORTUNITY OF PROMOTION.

TESTIMONY AND ARGUMENTS CONCERNING THE INTENSIVE SUPERVISION PROGRAM WERE MOTIVATED BY THE CONFUSION CREATED BY THE CHANGING MANAGEMENT STRUCTURE OF THE COURT. WHILE ALL MEMBERS OF THE INTENSIVE SUPERVISION TEAMS ARE FORMER PROBATION OFFICERS, SUCH TITLE HAD TO BE ABANDONED WHEN A TRANSFER TO THE INTENSIVE SUPERVISION UNIT WAS ACCEPTED.

IN 1900 NEW JERSEY HAD MANY COURTS WHOSE ORIGIN WAS ESTABLISHED UNDER COMMON LAW AND WHICH WERE CARRIED OVER IN SUCCESSIVE NEW JERSEY CONSTITUTIONS. IN 1947 OUR LATEST CONSTITUTION CREATED A MORE UNIFIED COURT SYSTEM, BUT, IT TOO, RETAINED SEVERAL INDIVIDUAL COURTS WITH COUNTY JURISDICTION. TODAY, THERE IS ONE COURT SYSTEM FOR THE STATE OF NEW JERSEY AND THIS SUPREME COURT MUST INTEGRATE THE VARIOUS FUNCTIONS PREVIOUSLY PERFORMED BY COUNTY UNITS INTO A UNIFIED WHOLE. THE DIFFICULTIES BEING EXPERIENCED ARE NATURAL TO THE EVOLUTION OF CHANGE. CHANGE HAS ALSO OCCURRED, AS IT DOES EVERY OTHER GENERATION, IN THE PERCEPTION OF THE PUBLIC CONCERNING PUBLIC EMPLOYEE FUNCTIONS. THE COURT HAS RECOGNIZED THIS IN ITS WILLINGNESS TO REVISIT ITS 1974 POSITION ON PROBATION OFFICER MEMBERSHIP IN POLICE ORGANIZATIONS. IT IS THE HOPE OF THIS SPECIAL

MASTER THAT HE HAS ASSISTED THE COURT IN ITS ULTIMATE CONCLUSION.

RESPECTFULLY SUBMITTED

PAUL R. HUOT

APPENDIX E

SUPREME COURT OF NEW JERSEY
E-57 September Term 1993

IN THE MATTER OF PROCEEDINGS CONCERNING PROBATION OFFICERS' MEMBERSHIP IN LAW ENFORCEMENT ORGANIZATIONS AND PROPOSED AFFILIATION OF PANJ WITH THE NEW JERSEY STATE POLICEMEN'S BENEVOLENT ASSOCIATION, INC.

Hearings held March 16, 17, 18, 19, 21, 1994
Report of Special Master Issued March 28, 1994
Submitted to the Court April 28, 1994 Administrative Ruling Issued July 8, 1994

David I. Fox and *Craig S. Gumpel* for petitioner Probation Association of New Jersey (*Fox and Fox*, attorneys).

Paul I. Kleinbaum and *Robert A. Fagella* for petitioner New Jersey State Policemen's Benevolent Association, Inc. (*Zazzali, Zazzali, Fagella & Nowak*, attorneys).

George Tosi for petitioner Fraternal Order of Police.

Jude Del Preore, President, Chief Probation Officers' Association, petitioner *pro se*.

Assistant Attorney General Robert H. Stoloff and *Deputy Attorney General Michael L. Diller* for respondent Judiciary of New Jersey (*Deborah T. Poritz*, Attorney General of New Jersey, attorney).

PER CURIAM

The Court has been asked to review its long-standing policy prohibiting probation officers from becoming members of law enforcement organizations along with the related issue of the propriety of the proposed affiliation of the Probation Association of New Jersey (PANJ) with the Policemen's Benevolent Association of the State of New Jersey (PBA). The parties directly interested in the issue are the Fraternal Order of Police (FOP), PBA, PANJ and the Chief Probation Officers Association. We decided that to aid us in our administrative disposition of the matter, we should appoint a Special Master to develop a record and make recommended findings of fact. Judge Paul Huot (Retired) kindly agreed to serve in that capacity. His service has been invaluable in this matter. The Probation Division of the Administrative Office of the Courts participated in the proceedings, basically in opposition to all other parties.

Our determination is grounded in long-standing policy considerations that have governed the exercise of our exclusive power over the administration of the courts. In this case that power involves the Probation Division, an integral part of the court system. Our determination is quasi-legislative based on the policy considerations noted below, conforming essentially to policies adopted by this Court in 1976, and on our own knowledge of the subject matter. These policy considerations, this knowledge, and our decision are all derived from our responsibility for, our authority over, our involvement with and our regular and continuing regulation and oversight of the Probation Division and its functions and operations. In arriving at our administrative determination, we have been very

much added by the testimony before the Special Master and by his report.

A. The Court's administrative determination

As a comparison of our determination and the Special Master's report indicates, we have not adopted all of his factual recommendations. Although we treat that subject explicitly at various points in our determination, we note here that our disagreement is not fact-specific, for as he notes the evidence was largely insufficient, given the time constraints of the hearing, to reach any such determinations (or as the Special Master noted concerning the central question before us, the evidence was "not such that a true factual determination can be made"). Concerning the matters submitted to him and his report on those matters, our differences, as we view them, are based on a different assessment of risks, are based on the importance of our plans for probation, and most of all are based on our responsibility to protect the probation function from those risks now and in the future. But our decision today is more fundamental, rooted in the nature of judicial integrity and its essential quality of impartiality.

Our decision rests on the fundamental difference between probation and police organizations. Probation is an integral part of the judiciary; everything that probation does it does as an arm of the judiciary. Among other things, it is the entity that enforces judicial orders. Given the nature and functions of probation, it must be as impartial as the rest of the judiciary, totally so and scrupulously so. Probation cannot take sides any more than a court may, and cannot be perceived as taking sides any

more than a court may. It is not pro-this or anti-that, it is not on the side of either men and fathers or women and mothers, it is not on the side of either parents or children, not on the side of either prosecutors or defendants. It has no more right to become allied with a public defender's office than with prosecutors or police. Probation represents no special interest in society and government but one: the courts.

Police and police organizations have but one interest and one role: law enforcement. Everything they do serves that interest: investigating crime, apprehending criminals, aiding in the prosecution and conviction of the accused, and in the imposition of punishment. The police stand firmly and properly on one side of the scales of criminal justice – the prosecution's side.

Put simply, the functions of police and probation – one serving the prosecution the other serving the courts – are not only different, but incompatible. Separation of the two is essential to the impartiality of the probation function and to the integrity of the judiciary.

The Court has therefore decided to maintain its policy prohibiting probation officers from becoming members of law enforcement organizations, in particular the FOP and the PBA. A directive to that effect will be issued, including a requirement that existing memberships in the FOP may not be renewed and in any event must be terminated by resignation or otherwise by January 1, 1995. We also prohibit affiliation of PANJ with the PBA.

B. Statement of basic probation policies

The opposing contentions of the parties and our discussion of them require at the outset a clear statement of the Court's position on certain basic policies so that there be no misunderstanding about them:

1) Probation officers must enforce court orders including conditions of probation; no function of probation is more important. While enforcement is subject to the admitted existence of some degree of discretion, the overall quality of enforcement must result in court orders that are consistently respected and obeyed. Lack of resources is unfortunately a reality that affects the level of enforcement; no other factor constitutes justification for a level of enforcement below that standard.

2) Cooperation between probation officers and police is essential in achieving the maximum effectiveness of probation. That cooperation exists today, and the Court strongly encourages it.

3) The probation function, especially in certain aspects of supervision and collection, has become increasingly dangerous. The Court supports measures to ensure the safety of probation officers.

4) The need to punish those convicted of crime has never been more important. One of the functions of probation and supervision of probation is punitive; it is a function that cannot be compromised. The Court will continue to direct probation to achieve that function for all probationers.

5) The need for greater emphasis on intensive supervision and rehabilitation as part of the probation function is becoming increasingly apparent. Guided by specific legislative appropriations, the Court has supported action in that direction, will continue to do so, and anticipates a substantial acceleration of that trend in the future.

The Court's determination today is consistent with the foregoing policies. None of those policies requires either an alliance between probation and police or membership of probation officers in police organizations. All of those policies require preservation of judicial impartiality in the probation function.

In the specific context of the issues submitted to the Special Master and his report, we note that the rehabilitation goal of probation, properly understood and administered, is not inconsistent with its punitive goal. Probation officers must pursue both goals: the punitive component without exception, and the rehabilitative effort measured by its potential achievement in the particular case. Probation officers need not act like police nor be identified as police in order to achieve the punitive goal; and if they do so act or are so identified, they will be significantly less able to achieve the rehabilitation goal.

C. The administrative proceedings and the Special Master's report.

The foregoing constitutes the underlying basis for our decision. The issues submitted to the Special Master, issues raised by the parties' request that we reconsider our policy, deal with specific aspects of probation not

directly addressed above. While those issues are ultimately related to and impinge on the judicial nature of probation and its essential impartiality, they touch on other matters as well. Involved is the present and future mission of probation, our plans for strengthening probation's effectiveness, and, in that context, a more detailed treatment of the impact of an alliance between probation and police. In the proceedings before the Special Master, PANJ and the police organizations, in addition to their implicit challenge to our statement of the essentially judicial nature of probation, question whether changing the present policy would have any adverse effect. They also claim that the policy is irrelevant both to the present and future mission of probation and to plans for strengthening probation. Since our response to those challenges and claims plays an important part in our decision, reinforcing the decision's fundamental basis as set forth above, we address this aspect in detail below. We note that whatever the specific context or aspect of the various disputes, the necessity of preserving the impartiality of probation officers and the probation function is central to the resolution of those disputes.

(1) Summary of AOC testimony

We note at the outset testimony of Harvey Goldstein, because its import is a recurring theme in these proceedings and in our decision. Mr. Goldstein, the Assistant Director of the Probation Division of the Administrative Office of the Courts, has had twenty-five years experience in various aspects of probation, holds a Master's Degree in Criminal Justice, and is the former President of the American Probation and Parole Association. He is,

and has been for the past eleven years, the official charged with primary responsibility for the probation function in this State. While he dealt with many aspects of probation as it affects this case, his statement of the role of probation – as consisting of both punishment and rehabilitation components – was the basis for his central conclusion: the critical need of probation today is to establish and maintain an appropriate balance between those two components, a balance seriously threatened by membership in and affiliation with police organizations. Mr. Goldstein pointed out various consequences of such membership and affiliation: the identity of probation officers as police in the mind of the probationer and the public; the identity of the probation function itself as police work; the impact of those identifications on the willingness of community groups to become involved in rehabilitative efforts, and its impact on the probationer's cooperation with those efforts; the influence of membership and affiliation on the conduct of probation officers, substantial and inevitable influence as he viewed it, although subtle and as a practical matter, largely undetectable and unprovable given the nature of probation work and the broad discretion vested in probation officers; the impact in fact and appearance on probation officers' impartiality in performing numerous functions that influence important decisions in criminal cases: bail, pretrial intervention, sentencing, and revocation of probation itself; and its impact on those probation officers holding important positions in the court system, in particular performing case management functions in the Criminal Division and the Family Division, including

holding positions such as team leaders and assistant division managers. Mr. Goldstein implied that even today the balance is not appropriate: that because of the shortage of resources, probation officers are hard pressed to perform their punitive role effectively, and the goal of rehabilitation is often theoretical. His view of the future of probation provides content to the concept of an appropriate balance: he noted the success, including its impact on recidivism, of the Intensive Supervision Program (ISP), and the implementation of the Juvenile Intensive Supervision Program (JISP) both programs relatively new, each including not only carefully supervised conditions of probation but also substantially expanded efforts at rehabilitation – and he pointed to intermediate sanctions, a probation model often described as somewhere between prison and conventional probation, proven to some extent in pilot projects in various counties, as the promise of the future, with its punitive component accompanied by deep community involvement in rehabilitative efforts to reintegrate probationers into the community. He noted through all of this the need for a substantial increase in probation resources, especially in probation officers.

From Mr. Goldstein's testimony, a clear picture emerged, a picture of probation today, struggling to achieve its goal, short of resources, the rehabilitative component seriously affected, the appropriate balance not achieved; and the future of probation, with all of its promise, its great potential, dependent on additional resources, dependent on restoring the balance by greatly strengthening both components. He stated his conclusions not as an academic theoretician but as a practical judgment from one experienced in probation that both its

present and future effectiveness, and especially its great potential for rehabilitation, would be hurt by the proposed membership and affiliation of probation officers in and with police organizations. In his testimony Mr. Goldstein strongly supported the need of cooperation between probation and police, but carefully distinguished cooperation from identification, with all of its consequences, and its potential damage. He thought probation should seek to establish between probationer and probation officer a relationship of trust, not surveillance.

William D. Burrell, Gregory B. Wilcenski, and Raymond R. Rainville provided supportive testimony. Mr. Burrell, with twenty-two years experience in probation, also holds a Master's Degree in Criminal Justice and is the former President of the National Community Service Sanctioning Association. He is presently the Chief of Supervision Services in the Probation Services Division of the Administrative Office of the Courts. Mr. Wilcenski, Chief of Juvenile Probation Services, has twenty-four years experience in probation and a Master's Degree in Criminal Justice. Mr. Rainville has twenty-five years experience in probation, a Ph.D. from Fordham University, and is the former President of the National Child Support Enforcement Association.

(2) Consideration of the present function and the future function of probation

An underlying question implicit in the administrative proceedings before the Special Master is whether the Court's probation policies may consider not just today's realities but also tomorrow's plans. The Court concludes

not only that today's realities justify its determination, but that a different determination would substantially damage the ability to achieve future plans. We appreciate the strength and sincerity of the opposing views of some probation officers. In particular, we are sensitive to the safety concerns that partially underlie those views. The wish, apparently shared by a substantial number of probation officers, to become more closely allied and identified with police inevitably gives us pause, for we are reluctant to impose on such dedicated judiciary employees a restriction that they find not only in conflict with their own wishes, but also one they believe is unjustified by their own understanding of the probation function. But the dangers of the moment cannot determine the long-term policies of probation, even though they have a significant impact today on safety. The position of the probation officers, however, also reinforces our conclusion concerning the importance of our determination, for obviously we are not restricting some theoretically possible identification of probation officers with police: we are in fact resisting a most concrete and substantial attempt to bring those two forces – police and probation – closer to unification.

The organizations before us paint a picture of probation officers able today to perform only one function, and therefore realistically with only one objective – enforcement of punishment – but with insufficient resources even to accomplish that. Given that single objective, and given the history of underfunding that relegated rehabilitation to an almost – theoretical goal, they note that neither the public nor the probationer have a different view – both see probation officers much the same as

police. Indeed, the reality of today is a probation function so starved for resources that supervision in many cases cannot achieve punishment, cannot secure compliance with conditions of probation, and even more so cannot achieve rehabilitation. According to Mr. Goldstein, the number of probation officers in New Jersey should be doubled. Administrative Office of the Courts, State of New Jersey, *A Model for Enhancing Probation Supervision: Purpose, Priorities, Practices,* (1992) at p. 47 and Tables 1 and 2. In response to the insufficient number of probation officers, that report (approved by the Supreme Court in November 1992) suggests classifying cases according to the degree of risk, dedicating more supervision to high-risk cases and less supervision to low-risk cases. *Id.* at 53. Establishing a priority of cases and, when appropriate, relaxing supervision will allow overburdened probation officers to manage their caseloads. *Id.* at 9.

(2)(a) Moving toward the twin goals of punishment and rehabilitation

The Court agrees, along with Goldstein and other experts in the field, that the two goals -- punishment and rehabilitation – must be balanced and that present knowledge, including experience in New Jersey, strongly points to substantially greater benefits to society when the rehabilitative component, long neglected, is addressed along with the punitive component. Our future plan is for a probation function with personnel sufficient not only to punish but to bring probationers back into the community as productive citizens in significantly larger numbers than now, to diminish recidivism, and, among other

things, to reduce the need for construction of prisons. The ultimate issue – whether probation officers should be even more strongly identified and associated with the police, in fact and in appearance, by allowing them to join police organizations and be part of a police union – turns on those differing policy goals. Clearly the judicial necessity of impartiality does not permit such alliance. Furthermore, we hold firmly to the conclusion that closer identification of probation officers with police is unnecessary to the achievement of the punitive function and is inconsistent with the rehabilitative goal of probation; that such close identification would constitute a serious obstacle to the cooperation of both the community and probationers, cooperation that is essential to rehabilitation, so important now and even more so in our plan for the future; that it would jeopardize those future plans; and, finally, that no scientific survey is required legally to support these essentially predictive conclusions, but rather that the practical and policy judgment is ours to make, a judgment fully supported on this record by the testimony of experts and by our own experience and common sense.

The questions raised by counsel suggest that the public wants enforcement and punishment, rather than rehabilitation. This is only part of the picture. What the public wants is an end to crime, an end to recidivism, and perhaps an end to the endless construction of new prisons. If, as we believe, the more likely path to these ends, a path supported by the Legislature, is an appropriate balance between the punitive and rehabilitative functions of probation, we owe it to the public to reset that balance; and if we believe that achieving that balance is

less likely if we turn probation officers into police, we owe it to the public not to allow that to happen.

The considerations that were the basis for this long-standing policy concerning membership in law enforcement organizations are even stronger today than before. Although they may not have been clearly spelled out at the time, those policy considerations appear to have had the same basis as today's decision: the need, both in fact and in appearance, of total impartiality on the part of probation officers as an arm of the judiciary, especially in matters related to law enforcement. Probation officers are on the side of impartial justice, as is the entire judiciary, and may not act or be perceived to act in favor of any other interest.

The future course for probation, although not yet fully implemented, requires impartial enforcement of more court orders that will have a significant rehabilitative component. The Court has intensely studied the probation function over the past thirteen years. We have formed commissions, task forces, and study groups, and held conferences in that effort. The most noteworthy conclusion, among many, of those studies is that probation's role is not only the punishment of offenders but also the rehabilitation of offenders and their ultimate reintegration into the community.

(2)(b) Recent developments in probation; future plans for probation; ISP, JISP, and intermediate sanctions

One model of that role is the Intensive Supervision Program, presently in place for adult offenders (ISP) and

in the process of implementation for juveniles (Juvenile Intensive Supervision Program or JISP), both supported by specific legislative appropriations. Probationers under ISP, as the name implies, are carefully and intensively supervised pursuant to court order to assure compliance with conditions usually much more severe than those applicable to ordinary probationers, who often get at most a phone call or a rare visit. Its punitive component is substantial, sometimes in fact the functional equivalent of the incarceration terminated by ISP. ISP's rehabilitative component, however, also pursuant to court order, far exceeds that of ordinary probation. It commences with assessments of plans proposed by probationers, families, and friends, including community support groups. The goal of the plan is the probationer's recovery, reformation, employment, rehabilitation, and reentry into the community. The program works through training, discipline, employment-seeking, organizing community groups, getting employers interested in the program, referral to appropriate service agencies for drug and alcohol treatment if necessary, and anything else that is conducive to rehabilitation. It has been enormously successful, as documented not only by dramatically lessened rates of recidivism, but by careful independent evaluations as well. See Frank S. Pearson, Institute for Criminological Research, Rutgers University, *Final Report – Research on New Jersey's Intensive Supervision Program* (1987), and Frank S. Pearson, Institute for Criminological Research, Rutgers University, *Deterring Drug Use with Intensive Supervision* (1991).

The key to ISP's success are the highly-trained, highly-dedicated probation officers directly charged with

the responsibility for all aspects of ISP, both rehabilitation and punishment. Their role, simply put, is to pull these many elements together and make them work. They are the right arm of the rehabilitation component. They are not just the probationer's keeper, but also the probationer's supporter, counselor, a link between the probationer's past and his or her hope for a future, and sometimes even a role model. They are firmly committed to the probationer's rehabilitation under court order, with the help of family, friends, and community, all in the effort to achieve a normal productive life.

The role of these probation officers would be impossible if they were perceived in any way as "law enforcers," as "police," or if they acted as such. Neither the community groups, the family, nor the probationer would accept, work with, or be inspired by someone thought to have punishment as the main goal. The same concerns apply to JISP. Although our experience with that program is more limited, we believe these concerns as applied to JISP are just as strong, perhaps even stronger, given the heightened sensitivity and vulnerability of juveniles, and their suspicion of authority figures.

Our support of ISP and JISP, as well as intermediate sanctions, a modified version of ISP discussed below, is not based on some penological policy independently adopted by this Court. ISP and JISP, with both punitive and rehabilitative components, were approved by the Legislature before either program was implemented by the judiciary, ISP in 1983 and JISP in 1992. That the Legislature has supported them is an understatement: in effect the Legislature has mandated them. While these programs were initiated by the judiciary, the fact is that

before implementation of either, line item appropriations were passed by the Legislature, the appropriations confined exclusively to the funding of ISP and JISP. Such appropriations are intended by the Legislature as both support for a program and a direction that it be implemented, and are ordinarily so regarded by the judiciary. This legislative support and direction have been remarkably strong: during a period of severe fiscal constraint and shrinking budgets, funding of the ISP line item has held firm and the JISP line item, funding a new program, was started, a most unusual occurrence during years when funding of existing programs was often diminished or even eliminated. The penological policy, therefore, implicit in ISP and JISP is very much legislative, fully concurred in by the judiciary.

Even more than ISP, the future of probation is in the area of intermediate sanctions, a modified form of ISP. Intermediate sanctions consist of court orders providing for supervision less intrusive than ISP, for rehabilitation more extensive, and with integration into the community as its touchstone. Assuming legislative concurrence and support, this is what we see as the future of probation, applied to probationers in far greater numbers than the legislatively approved ISP or JISP. In intermediate sanctions programs, probation officers are part of a community program, organized by community activists, court personnel, treatment providers, potential employers, interested citizens, public officials – a plan of rehabilitation and integration into the defined community (a section, a block, a group) in all of its elements, but still with a defined collection of individuals directly responsible for the probationers. Unlike ISP, this program does not

require prior incarceration, for neither jail nor prison is necessarily appropriate for these less-than-serious offenders although without the availability of intermediate sanctions as a sentencing option, jail or prison is in fact often the sentence. The potential impact of intermediate sanctions on the prison and jail population could be substantial. Critical to this effort are the probation officers, responsible for assuring that intermediate sanctions are working, that not only are the conditions of probation, i.e., punishment, met, but also that the at-least-equal goals of rehabilitation and integration into the community are realized.

Intermediate sanctions (and its result in reducing recidivism) is the hope of the future for probation. But it is more than mere hope. We have in fact tried it in New Jersey – in Newark and in New Brunswick (and to a lesser extent at the county level in Bergen, Camden, Morris, Essex, and Union Counties), and it appears to work, although the experience so far has not been extensive. The concept has enormous promise, both for those probationers who will benefit and for society. The incompatibility of a probation officer's role in this program with the identification of that probation officer as a police officer is glaring: trust, confidence, and hope – not punishment – are the essential ingredients for the cooperation of all involved in intermediate sanctions and for the program's success. An intermediate sanctions program will not even get off the ground without the initiative of an impartial probation officer, without the ultimate responsibility of a trusted probation officer. The necessary individuals and institutions in the community will not participate if they believe the probation officer is

more interested in discovering and punishing a violation of probation than in encouraging a potential for rehabilitation.

The inability to obtain community support for a probationer under a court order designed to integrate him or her into society cannot be supported by statistical analysis, but the anecdotal evidence is persuasive. Mr. Goldstein noted one conversation, the theme of which was common to many conversations he had throughout the state, when community activists told him that they would never attempt to become involved in such a program if probation officers remained "mini cops," that "if all you want us to be is mini-cops who are going to be watching what your clients are doing and reporting them so that you can have them re-arrested and sent back to court for other kinds of handling, we don't want to get involved."

The likely future of probation, described above and proven by present experience, thus provides added support for our position. The allowance of membership in police organizations moves us in the wrong direction and threatens the success of probation. But for the obvious fiscal constraints, our proposed budget would have included the very substantial expansion of probation needed to implement our plans further. The organizations before us in effect dismiss these plans as unrealistic, given present fiscal constraints. Our determination of the question before us is not the appropriate place for budgetary analysis, but obviously, if successful, the cost of such programs in the long run may be justified by savings far exceeding costs.

This emphasis on rehabilitative programs underlines the necessity that probation officers must both in fact and in appearance be totally impartial – especially given our overall view, significantly supported by the Legislature, that probation's future is grounded in ISP, JISP, and intermediate sanctions. The integration, involvement, and identification of probation officers as police is inconsistent with that future. It would do damage even as it affects probation today, damage to the role of probation today and to programs that are already in place. But its potential harm for the future is much greater, since probation's future itself is much greater. We will not risk that future implementation with any such entanglement of probation with the police.

The importance and timeliness of our plans for the future are underlined by the advent of State funding. Probation, like the rest of the judiciary, has been afflicted both in its funding and management by the existence of twenty-one counties disparately supporting judicial functions, including especially the probation function. The result has been a variety of practices, procedures and policies making a coherent State policy difficult to achieve. It is now possible, as a result of State funding, to implement the studies that we have made, to implement the legislative policy, a policy that we believe in, and, more than possible, it is something for which we can and should be held accountable. The greater likelihood of funding adequate to implement that policy statewide must not be jeopardized by actions that impair our ability to do so, actions that will properly be recognized as such.

Extracts from the following reports indicate the judiciary's commitment to both the punitive and rehabilitative functions of probation, the increasing importance of the rehabilitative goal (within the context of a recognition of its primary duty to enforce court orders) and the consequent increased stress on community involvement, along with the emergence of intermediate sanctions and its importance:

> Final Report (approved by Supreme Court April 1993), 1992 Judicial Conference on Sanctioning and Probation (pp. 1, 2, 7, 8, 13-16)
>
> 1992 Judicial Conference on Sanctioning and Probation (Report of the Committee on Probation Management (pp. 15, 30-31); (Report of Committee on Community Supervision (pp. 1, 3, 4, 10))
>
> Final Report (approved by Supreme Court November 1991), 1990 Judicial Conference on Drugs and the Courts (pp. 40, 41, 45)
>
> Final Report (approved by Supreme Court October 1990), 1989 Judicial Conference on Juveniles, Justice and the Courts (p. 39)
>
> 1989 Judicial Conference on Juveniles, Justice and the Courts (Report of the Committee on Community-Based Treatment and Services (pp. 48-52)).

Extracts from the Final Report of the New Jersey Sentencing Policy Study Commission appointed by the Governor (1994) (pp. 2, 12, 75, 76) point in the same direction.

(3) The increased need for impartiality: role conflict problems

Other factors, not present when our policy prohibiting membership in law enforcement organizations was first pronounced, are strongly supportive today. The vast majority of case management personnel in the Criminal Division and the Family Division of Superior Court are probation officers, including some assistant division managers and team leaders. The fact is that probation officers provide a rich pool of talented public servants uniquely qualified for that type of work. Given the absolute mandate of impartiality in those positions, and given that they are court officers performing important functions in which the police and law enforcement in general have a substantial interest and, indeed, have adversarial positions, their identification as members of a police organization would be unthinkable. That it is theoretically possible to single out those probation officers from other probation officers and extend the prohibition only to them is no solution. Not only does that understate the importance of the prohibition as generally applied to all probation officers, but it would restrict the judiciary's ability to assign and reassign personnel from probation functions (or collection functions) to case management functions and back. The identification of case management professionals as former members of a police organization will not disappear so quickly, nor will their general identification as part of law enforcement, if probation officers generally are perceived as police, as part of the PBA or FOP.

(4) The potential consequences of PANJ affiliation with the PBA

The affiliation of PANJ with the PBA would compromise probation's impartiality and would be inconsistent with our basic conclusion that the probation and police functions are fundamentally incompatible. The stipulated result of the proposed affiliation would be membership of probation officers in the PBA. Furthermore, other potential consequences of this affiliation threaten the impartiality and integrity of the probation function. We cannot say from the record before us, and we simply do not know, if the PBA would insist that probation officer members adhere to the relationship with the PBA that is clearly contemplated by its constitution and be required to satisfy all PBA membership obligations. In the absence of any evidence to the contrary, we assume the PBA will so insist; the next two paragraphs are based on that assumption.

In addition to automatic membership in the PBA, all probation officers who are members of PANJ (and perhaps those who, though not members, are in units represented by PANJ) will be "subject to the jurisdiction" of the PBA. Their organization becomes a "local of the PBA." Like all such locals, they will have the right to endorse political candidates, take positions on political and legislative issues, and will be obliged to maintain public relations with local legislators. Each such probation officer will have a PBA car shield issued to him or her, along with "safety cards," which we assume identify the holder as associated with the PBA for whatever advantage that may bring. Although the PBA will not act

as PANJ's exclusive negotiating representative, it is available for such advice and consultation and guidance in that area as PANJ may desire. Counsel stated that although the PBA does not routinely sit at the bargaining table, it would if asked.

Every such probation officer will be required to complete a police training course (PTC) and certification. Our understanding is that the PTC requires nine continuous weeks, five days a week, of training designed to improve the skills of police officers, to make them better police officers, including inculcation of respect for law enforcement values and the interests of law enforcement personnel – police. Putting aside the very substantial problem of the loss of services of these probation officers by the judiciary, their potential transformation from probation officers into police officers is obvious. As the Special Master noted, one of the consequences of affiliation is that PANJ will lose its autonomy, and to that we add so may the probation officers.

> Each probation officer will be subject to the control and regulations of the State PBA. Probation officers may be placed in the position of supporting or opposing political candidates or legislation which may or not be in the best interest of probation officers. Probation officers may be placed in the conflict position where the state organization offers a monetary reward in connection with the arrest and conviction of a defendant convicted of assaulting or killing a PBA member.
>
> [Special Master's report at 10.]

We cannot say from this record precisely what the effects are of PANJ and probation officers being "subject to the jurisdiction of the PBA." What is apparent, however, is that the affiliation, the membership of probation officers in PBA, and the relationship that results, contemplate an entanglement of probation officers with police that may significantly affect and transform them and the probation function. They will have become committed to the goals of the PBA, to the interests of police; they will be subjected, we assume, on specific issues to newsletters and the like, and to other efforts to subscribe to the position of the PBA, and to work in support of it. They will presumably attend PBA-sponsored meetings reinforcing that allegiance. To the extent any or all of the foregoing is generally known, their identification as the impartial employees of the judiciary will be overwhelmed by their identification as law enforcement officers allied with the police, and in fact the distinct risk exists that they will become such.

Probation officers, thus identified as, and identifying with, police would continue to investigate for and prepare pre-sentence investigations, a critical factor in judges' sentences; bail reports, important in determining the terms of bail, including the amount; pretrial intervention investigative reports, often determinative of admission to or rejection from that program; and probation violation reports that may lead to imprisonment of the probationer. All of these reports may depend significantly on police information. A probation officer who identifies with the police may be less able to critically evaluate that information. The damage to the judiciary of the appearance of police bias is obvious and profound as is the

damage to the defendant from the possible police bias in fact – conscious or subconscious. In addition, probation officers continue to act as court-support personnel, including team leaders and assistant division managers, in both the Criminal and Family Divisions of the Superior Court where their services affect law-enforcement-related matters in many other important ways.

We need not look into the future of probation that we are trying to establish, but can simply view probation as it exists today to grasp the incompatibility of these consequences with probation's function. This is no "social and fraternal" relationship, such as that found to have been established by membership in FOP. The PBA is an organization actively supporting the interests of police in every legitimate way possible, politically, legislatively, and through the support of its members, an organization that expects its locals – to which it would add PANJ and all of the probation officers within PANJ – to follow its lead.

We therefore prohibit the proposed affiliation.

(5) The Court's position and the Special Master's report: probation's affiliation with and membership in the PBA

The Special Master's report and recommendations are based on his view of probation as it now exists. If probation's lack of resources and its consequent inability to fulfill its role is assumed to be a permanent condition, our disagreement with the Special master would be less pronounced. We do not accept today's significant identification of probation officers with law enforcement and

police, nor the presumed approval by everyone, including the public, of a system dedicated almost exclusively to enforcement and punishment as distinguished from rehabilitation and integration into the community. Strict enforcement of court orders is essential, and we do not intend to allow it to be weakened. Indeed, we have set up a comprehensive enforcement court that has been so effective in that area that the Legislature recently signaled its support for statewide expansion. But this picture of the present is precisely what we do not wish to reinforce or to freeze. The Special Master notes the heavy caseload of probation officers – an average of 175 cases per officer, and in one county as much as 300. His implication, and a correct one, is that it is impossible under present circumstances for most probation officers to do more than a telephone call or a visit, to say nothing of effective rehabilitation and integration into the community. The point of difference is that we are determined to change that situation and will not surrender to present circumstances by making it even more difficult in the future to do so. That is precisely one effect of membership in the PBA: it would make our task more difficult, and make the achievement of our goals less likely.

We agree with the Special Master that the testimony, perhaps because of the nature of the issue, was such that a true factual determination could not be made, and here we are referring to the difficulty of evaluating the risk of damage to probation's future. Our concern is with the risk itself, and the extent of the risk, and the values threatened by the risk. We believe the risks substantial, and we know that the values are. That today's probationer views the probation officer as "enforcing" good

behavior rather than as an instrument for rehabilitation may be all too true, but again it is not a condition we are willing to strengthen. That the public, according to the Special Master, would applaud PBA membership proves, to us at least, the urgent need to continue to transform probation not as membership in the PBA would, but to transform it to the extent suggested above, and in a way that the public would understand, in order to give probation the chance to prove its rehabilitative powers so that the public would applaud successful rehabilitation of offenders, successful integration of those offenders as productive citizens in our community, successful reduction of recidivism, and a successful slowing down of the escalating costs of prison construction and operation.

The Special Master notes that "there is no evidence one way or the other" on whether the probation officer, because of PBA affiliation and membership, will act differently toward those he or she is to supervise or investigate. We respectfully disagree. We believe the affiliation membership itself, along with PBA's constitution and goals, is evidence of its likely impact on probation officers. This is not an organization that has been a nullity, without influence on its members. It actively promotes the interests of the police with the Legislature and the Executive. It has a formidable presence in society. The Special Master observes that the effect on *each* probation officer will depend on the officer's professionalism, that being the Special Master's "view of human nature." Certainly the impact of being affiliated with the PBA on each probation officer who is a member cannot be predicted with any confidence; it obviously depends on the individual. But the Court *can* predict that it *will* have some

impact on all such probation officers, an added police influence in their work, and that it may, and probably will, actually affect many of them in their work, however subtly. The Court must be concerned with how the overall impact of the affiliation, its probable direction, its likelihood of influence, will affect the probation officers' relationship with probationers, even though "it will," as the Special Master points out, "depend on each individual." Certainly the strength of the movement of probation officers to associate with police, whether in the FOP or in the PBA, is testimony to the conclusion that the risks of identity and influence is more than minimal.

Our determination and the foregoing observations adequately indicate the extent of our disagreement with parts of the Special Master's finding, report, and recommendations, and the basis for that disagreement. Among other things, we differ with the statement that "it would appear that membership in the Fraternal Order of Police or Policemen's Benevolent Association will not affect the functions of probation." That conclusion of the Special Master is presumably qualified by his prior observation of the inability on this record to make a "true factual determination." Whatever the probability of truth may be in that prediction as applied to probation as it exists today, we find the risk of that effect unacceptable, even today, and totally unacceptable in terms of the future.

We realize that the identification of probation officers as police and the impact of that on the probation function, both present and future, while a conclusion based on our own knowledge and experience, as well as that of Mr. Goldstein and other experts in the court system charged with responsibility for the probation function, is

a conclusion at odds with the views of many probation officers. Those holding a contrary view note that probation officers will not wear PBA badges, they doubt that the identification of probation officers as police will be any greater than it is now; and they suggest that it will not cause damage, noting the existing, albeit unauthorized, membership of some probation officers in the FOP. Despite these contrary views, we must act on our own best judgment. Our responsibility is clear, as is our authority. It cannot await painstaking surveys and statistical analyses of potential public perceptions and the potential effects on probation officers, with all of the uncertainty accompanying such studies. Our responsibilities call for practical judgments, not scientific certainty. Furthermore, resolution of the issue is not amenable to anything even approaching scientific certainty. Government, including the judiciary, is permitted to use its power based on its best judgment, so long as it is rational. Government is not obliged to demonstrate itself as an unerring soothsayer.

Nor can we afford to wait for the effect of police identification to set in. Some probation officers argue that if some individual officers do not do their job right, if they act more like police than probation officers, if they err toward punishment at the expense of rehabilitation, then specific corrective action can be taken – they can be disciplined or dismissed. We reject that suggestion. As Mr. Goldstein noted the nature of the probation function allots a significant portion of the officer's work to discretion, and that discretionary aspect is almost impossible to monitor. Since we cannot detect the damage, we must try

to eliminate the risk. We must assure that the fundamental conditions of employment do so, that they are consistent with the policies of the Court.

(6) The Court's position and the Special Master's report: the risks presented by FOP membership

While the significant differences between the FOP and PBA effectively undercut the argument that no harm to the probation function will result from PBA membership inasmuch as allegedly none has resulted from the unauthorized membership of some 600-800 probation officers in FOP, those differences still leave us with the question of the justification for prohibiting probation officer membership in FOP.

Given the differences in the activities of these two organizations and even in their stated goals and stated permissible activities, the risk to the probation function from FOP membership does not at present appear to equal the risk of PBA membership and affiliation. FOP prohibits political and legislative activity; it is not "a labor union" and may not become affiliated with any union of *industrial* workers. Although the Special Master found that in fact the FOP, like PBA and PANJ, has engaged in political activity, he also found that it was "primarily a social and fraternal association," and that the activities of probation officers as members were limited to social and fraternal relations.

The crystal clear fact remains, however, that the FOP is an organization devoted to the interests of police. It is a police organization. It announces itself as such; it functions as such. And there is some inevitable risk that in

fact and in appearance it will affect probation officers. We say this on the basis of logic and experience, and even though we have been unable in these proceedings to measure any actual damage done by prior membership by probation officers, the risk is obviously there.

We agree that the FOP's constitutional prohibition against membership by anyone who is not a law enforcement officer is irrelevant to the issue before us. That is a matter for FOP determination, and if it decides that probation officer membership does not conflict with its own constitution, we have no business interfering with that determination.

While the resolution of the question is not as clear as it is with PBA, we conclude that our duty to preserve the impartiality of the probation function in fact and in appearance, and probation's ability to continue to implement our existing programs and future plans, must not be subjected even to the lesser risk posed by such membership. That the judiciary cannot control or keep track of the possible evolution of FOP and the possible changes in its policies or activities should be obvious from this record, for we were unaware of the very substantial violation of our prior orders prohibiting FOP membership.

Associational rights are precious and should not be restricted without reason. But where important legitimate interests are involved, compelling interests, government must be practical in its protection of those interests. The risk may increase in the future; it may remain the same. But if government's justifications for action are basically

sound, we do not believe government is required to constantly measure the balance between risk and associational rights in order to support its decision. If one believes, as do we, that the identification of probation officers as police and the influence of probation officers by police are inconsistent with the essential impartiality of the judiciary and as well with important goals of the judiciary, then the level of risk involved here is not acceptable; it is much more than minimal and we know of no other way to effectively eliminate it.

A decision barring future membership in PBA but permitting continuation of the present unauthorized membership in FOP is not simply incongruous, it would be a policy going in two different directions at the same time. The Court will not at the same time create new protections for probation while destroying those that previously existed. Both are needed, even though one seems more badly needed than the other.

A most significant fact bearing on the relevance of the lack of proof of any impact of FOP membership on the performance of probation officers is the history of that FOP membership. The 600 to 800 probation officers who became FOP members did so under circumstances that suggest they were then uniquely unattached to the FOP and therefore unlikely to be influenced by its activities. Five hundred and fifty of them joined wholesale, not as individuals expressing a desire to become involved in FOP, but as probation officers who were members of collective negotiation units whose representatives decided to bring all of them in, en masse, as FOP members. They did not apply individually for membership, they did not pay for membership. Their unions, in

Bergen, Essex, Hudson, Passaic and Union Counties, decided that they would become members; the union paid their membership dues, at which point they each automatically became members. Their motivation was simple; they wanted the benefit of certain kinds of group insurance that afforded them coverage at lower rates than they would otherwise get. It is hardly a measurement of the potential of bona fide FOP membership on the function of probation to note the lack of its impact on these particular members. We do not challenge the legality or legitimacy of such membership, we simply note its nature.

The fact that probation officers, and perhaps the public, are quite content with present arrangements, content with FOP membership, the fact that they appear, when stated, to be neutral, benign, unimportant, because they are "social and fraternal," all of this masks the obvious truth underlying the association. Why the Fraternal Order of Police? Why not Rotary, Kiwanis, Knights of Columbus, or hundreds of other social or fraternal organizations, even some with activist agendas? It is the police function that attracts, it is the identification by the probation officers themselves with the police and vice versa that is underlined. It is the striking manifestation, no matter how benign, of precisely what this Court is trying to avoid, to prevent, and to eliminate. If the public does not mind, if probationers do not mind, it is because they already believe that probation officers are police. If we are ever to change that perception, this membership cannot be permitted.

We need not wait to act until the organization – an organization dedicated to professionalism, not a labor

union, not involved in politics or legislation – begins the process of transformation, in competition with the PBA, that has occurred with other similarly professional, non-labor organizations in the public employee field. The New Jersey Education Association at one time proclaimed itself as a professional organization uninvolved in politics, legislation, or union activities. We note that after these proceedings began, a local lodge of the FOP filed a petition to be the exclusive labor representative of the probation officers of Essex County, the largest group of probation officers in the State. The State FOP's constitution has a statement that it is not a "labor union." We need not calibrate the FOP activities, day-by-day, month-by-month, or year-by-year, to determine the moment that the balance shifts and when the risk becomes apparent enough to others to justify our action. Police or probation: the two simply do not mix, and the risk of the mix, we conclude, justifies this associational abridgment.

(7) Other issues

Since we did not submit any constitutional issues to the Special Master, he properly declined to rule on counsel's oral contentions made at the hearing. Briefs were not submitted nor was any record developed specifically directed at those issues. Our ruling today is administrative, based on our exclusive power over the administration of justice, a quasi-legislative power. Obviously our courts are available, including this Court, to adjudicate any constitutional issues related to this matter that may be raised in appropriate litigation. We note, however, that Article I, Paragraph 19 of the New Jersey Constitution

does not appear to be involved, since PANJ does not seek to have the PBA as its negotiating representative.

The Court expresses no opinion on whether police officers are prohibited by *N.J.S.A.* 34:13A-5.3 from becoming part of collective negotiation units that include probation officers. As the Special Master's report suggests, it is a question affecting the rights of police, not the rights of probation officers, and, as such, is a question inappropriate for administrative determination by this Court.

On an unrelated aspect of the matter, we note the Special Master's observation that probation officers would likely designate PANJ as their collective negotiations representative if a state-wide election were to be held. Putting aside the question of its relevance, we note simply that we do not predict election outcomes.

D. CONCLUSION

To summarize, we have decided to maintain the Court's policy prohibiting probation officers from becoming members of law enforcement organizations. This decision applies to both the PBA and the FOP, even though we recognize differences between the two organizations. In addition, we cannot allow the PANJ to affiliate with the PBA. We decide these matters on the basis of Court policy.

The Court's decision is based, as noted at the outset, on the nature of judicial integrity and its essential quality of impartiality; on the fundamental difference between probation and police organizations and the resulting fundamental incompatibility between the two. The Court's

decision is further supported by probation as it functions today and by the judiciary's future plans for probation. The consequences of probation officers themselves identifying with the police, and being identified by probationers and the public with the police, threaten, in fact and in appearance, the impartiality of the judicial branch of government. These problems are real today, particularly with case management personnel, from whom the system requires absolute impartiality, and also with probation officers who critically affect matters in which police are interested, who depend on police for information, as well as other probation officers. We are convinced those problems of today will be even worse tomorrow as the probation function heads in the direction of an appropriate balance between punishment and rehabilitation. Rehabilitative efforts will be severely damaged, if not totally frustrated, by an alignment, perceived or actual, between law enforcement and probation officers.

Although some other suggestions have been proposed, we believe that nothing short of strict separation can adequately address the concerns we have noted. Neither a wait-and-see nor an individual-based disciplinary approach is institutionally appropriate. We must continue the prohibition. The integrity of probation and the judiciary require it.

APPENDIX F

ADMINISTRATIVE OFFICE OF THE COURTS
STATE OF NEW JERSEY
[SEAL]

ROBERT D. LIPSCHER
ADMINISTRATIVE
DIRECTOR OF THE
COURTS

RICHARD I. HUGHES
JUSTICE COMPLEX
CN-037
TRENTON, NEW JERSEY
08625

December 7, 1994

Directive #9-94

TO: Assignment Judges

FROM: Robert D. Lipscher RDL

SUBJECT: **Probation Officers' Membership in Law Enforcement Organizations (FOP/PBA)**

On July 8, 1994, the Supreme Court issued its Administrative Ruling in the above matter. The Court decided "to maintain its policy prohibiting probation officers from becoming members of law enforcement organizations, in particular the FOP and the PBA."

The Court's decision rests on the fundamental difference between probation and police organizations. "Probation is an integral part of the judiciary; everything that probation does it does as an arm of the judiciary . . . Given the nature and functions of probation, it must be as impartial as the rest of the judiciary, totally so and scrupulously so." The Court asserted that "police and police organizations represent one interest: law enforcement. Separation of the two is essential to the

impartiality of the probation function and to the integrity of the judiciary."

The Court further provided that "existing memberships in the FOP may not be renewed and in any event must be terminated by resignation or otherwise by January 1, 1995." Affiliation of PANJ with the PBA is also prohibited.

To ensure full compliance with this Supreme Court policy, every probation officer in each division will be provided with a copy of this Directive by the Trial Court Administrator, and sign to acknowledge receipt. New employees of the Probation Division will be given a copy along with their benefits package and instructed to acknowledge receipt within 48 hours. While each probation officer belonging to the FOP has an individual obligation to terminate that relationship by January 1, 1995, it is the responsibility of the Chief Probation Officers to ensure that that is done and to inform this office (the AOC) of any failure to comply. Failure to comply with this Directive will result in disciplinary action.

c: Trial Court Administrators
Chief Probation Officers